Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

DANIEL-MARC AUGER, et. al., Petitioners

vs.

ANTOINETTE TENEYCK, et. al., Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did Petitioners' Pro Se Complaint state a cause of action under Fed. R.Civ.P. 12(b)(6)?

2. Did Petitioners' Pro Se Complaint state a cause of action under rules concerning interpretation of pro se pleadings?

3. Did the Petitioners state a cause of action under 42 U.S.C. §1983 by alleging a conspiracy between immune state court judges and private parties?

4. Did the Third Circuit deny Petitioners due process by permitting the district court to dismiss their claims sua sponte without notice or hearing?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were as follows:

Appellants:

Daniel-Marc Auger

Chantal-Marise Auger

Raymond Auger

Appellees:

Judge Robert Muir

Chief Justice Robert Wilentz

Antoinette Teneyck

Steven Teneyck

Dr. Janet Berson

Kenneth S. Domzalski, Esq.

Brian Guest, Esq.

Lu-Ann Watson, Esq.

Paul Snyder, Esq.

Dr. Julian Freeman

Judge James A. Yocum

Judge Cornelius Sullivan

Judge Martin Haines

Judge Anthony Tunney

Judge Victor Friedman

Judge Michael King

Judge Warren Brody

Judge Julio Ashberg

Judge James H. Coleman

Judge William M. D'Annunzio

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CITATIONS TO OPINIONS

The Unpublished Opinion of the United States Court of Appeals for the Third Circuit, which appears in the Appendix, is found at App. A. The Opinion of the United States District Court for New Jersey is found in App. B.

JURISDICTION

Petitioner seeks review of a Third Circuit decision dated November 26, 1990. App. A. The Third Circuit denied a pro se petition for rehearing on January 25, 1991. App. C. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment XIV:

> Section 1: No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.
>
> Section 5: Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

2. United States Constitution, Amendment V:

> No person shall be...deprived of life, liberty, or property without due process of law;...

3. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

4. §1985(3). Depriving persons of rights or privileges:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws...; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or

property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

5. §1986. Action for neglect to prevent conspiracy:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USCS § 1985), are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action...

STATEMENT OF THE CASE

Petitioners are a divorced father and his two minor children struggling to get their day in court. The Third Circuit unjustly deprived them of any opportunity to conduct discovery and try to prove their case. Raymond Auger and his children petition this Court for review of the Third Circuit's decision to affirm without opinion the granting sua sponte of a motion to dismiss for failure to state a cause of action.

This case presents a painful, cruel scenario arising from a domestic relations dispute, a context unfamiliar to district courts. Petitioner and his former wife, Defendant/Respondent, Antoinette Teneyck, divorced in April, 1983. They had two children. Since

then, Petitioner has seen his parental rights wither away. The New Jersey courts first awarded joint custody, but later, upon request of his former wife, altered custody in April, 1986. In 1989, the court awarded sole custody to Petitioner's former wife and reduced his visitation.

Petitioner attempted to exercise visitation in good faith. However, his former wife, along with her new husband, Respondent, Steven Teneyck and other parties, maliciously conspired to interfere with Petitioner's visitation rights and harass Petitioner, with the intent of depriving him of the custody and company of his own children.

Petitioner sought redress in the district of New Jersey by filing a sixty-

page Pro Se Complaint in July of 1989. App. F. He alleges they did the following (keyed to Pro Se Complaint, App. E):

(1) The Teneycks repeatedly violated court orders directing them to make the children available for visits. (p. 18 at ¶5), p. 24 at ¶15, p. 7 at ¶2), p. 31 at ¶31, p. 32 at ¶34, p. 32 at ¶33)

(2) They produced the children late or not at all. (p. 32-33 at ¶33-34)

(3) His former wife harassed Petitioner by calling the children hundreds of times while the children were

visiting Petitioner. (p. 20 at ¶8)

(4) His former wife spied on him and stole property belonging to him. (p. 19-20 at ¶6, p. 22 at ¶11, p. 28 at ¶26)

(5) She refused to allow the children to speak with Petitioner on the phone when they were at her home. (p. 26 at ¶21)

(6) Steven Teneyck abused Petitioner verbally and even assaulted him physically in front of Petitioner's children. (p. 24 at ¶16)

(7) They lied under oath in court during custody proceedings. (p. 20 at ¶7, p. 23 at ¶12 and ¶13, p. 26 at ¶20, p. 40 at ¶52)

(8) They failed to give Petitioner notice that they intended to take the children on vacation. (p. 28 at ¶2)

(9) His former wife filed false charges against Petitioner. (p. 18 at ¶5)

(10) Mr. Teneyck prevented Petitioner from seeing his children. (p. 31 at ¶31).

(11) His former wife used the legal system to harass Petitioner. (p. 30-31 at ¶29)

Petitioner alleges that Steven Teneyck conspired with his former wife to substitute him, Steven, as the father of Petitioner's children. App. E. at p. 33-34 at ¶36 and ¶37) Petitioner contends that the Teneycks intended to deprive him of his right as the father to associate with and parent his children.[1]

Petitioner alleged in his Pro Se Complaint that others conspired with Mr. Teneyck to deprive him of his children: Judges who rendered decisions throughout the state court litigation and denied him

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[1]The conspiracy has hurt Petitioner all the more because he lives only one-fifth mile from his former wife.

fundamental procedural and substantive rights,[2] an attorney for the Teneycks named Kenneth S. Domzalski and Janet Berson, a court-appointed psychologist who rendered an expert opinion.

His Pro Se Complaint alleges the following concerning attorney Domzalski (keyed to App. E):

1. He conspired to defraud Petitioner. (p. 4 at ¶6)

2. He lied in court. (p. 4 at ¶7)

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[2]Petitioner concedes that a suit would not lie against the judges because of immunity which applies to their judicial acts. However, he contends they actively participated in the conspiracy. Also, this petition does not contest the dismissal of Respondent Dr. Julian Freeman from the case.

3. He knew of and supported the Teneyck's numerous violations of court orders. (p.4 at ¶8)

4. He repeatedly harassed Petitioner. (p. 4-5 at ¶10, p. 28 at ¶24, p. 41 at ¶54)

5. He threatened Petitioner. (p. 41 at ¶53)

6. He lied in court. (p. 30 at ¶49 and ¶50)

These allegations, as a whole, contend that Domzalski transcended his role as an advocate, and participated in a conspiracy to defraud the court.

Petitioner alleged the following concerning the court-appointed expert witness, Janet Berson:

1. She refused to interview persons favorable to Petitioner's position concerning custody. (p. 36 at ¶42)

2. She refused to adequately investigate the question of Petitioner's fitness as a parent. (p. 37 at ¶44)

3. She permitted her report to contain gross errors. (p. 37 at ¶45)

The allegations against Dr. Berson, taken as a whole, contend that she abused her role as a neutral expert by impermissibly favoring Petitioner's

former wife and joining the other parties in conspiring against Petitioner.

The Pro Se Complaint pled constitutional deprivations under the First, Fifth, Eighth and Fourteenth Amendments. App. E, p. 1-2 at ¶1, 2. It pled a "conspiracy to deprive Petitioner of constitutional rights," that Defendants acted "in concert" to deny him his parental rights. App. E, p. 4 at ¶6, p. 12 Petitioner expressly pled 42 U.S.C. §§1983, 1985 and 1986.[3] App. E at p. 13 He pled:

> Steven Teneyck interferes with and intrudes upon with the consent and encouragement of Antoinette Teneyck, the parental rights of the father...

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[3]These statutes provided federal jurisdiction in the district court.

App. E, p. 34 at ¶37. In the conclusion of the Complaint, Petitioner pled "conspiracy to deny due process of law..." App. E at p. 51, and demanded compensatory and punitive damages against his former wife and her husband and other parties. App. E at p. 53-54.

The district of New Jersey, in an unpublished opinion, dismissed the Complaint upon motions of the parties for failure to state a cause of action. However, it dismissed for failure to state a cause of action as to the Teneycks sua sponte without giving Petitioner any opportunity to be heard. No motion to dismiss them had been pending. See App. B district court opinion at 15.

The district court erroneously applied U.S.C. §1983 and failed to address Petitioner's claim under §§1985 and 1986, even though the §1985 and §1986 claims were absolutely clear on the face of the Complaint. The district court's opinion will be discussed, infra.

The Third Circuit summarily affirmed in an unpublished opinion. See App. A. The Petitioner, still pro se, filed a petition for rehearing, App. D. but was denied. See App. C.

The Petitioner has been dealt an injustice by the district court and Third Circuit. The district court (1) failed to liberally construe a pro se pleading as required by Supreme Court precedent, (2) failed to properly apply the correct standard to motions to dismiss under R.

12(b)(6), (3) failed to apply settled Supreme Court precedent regarding §1983 and (4) improperly dismissed the Teneycks, the main perpetrators of the conspiracy sua sponte without giving Petitioner notice or opportunity to respond.

Now comes Petitioner for a writ of certiorari to the Third Circuit directing it to reverse and remand to the district court for proper consideration of the §§1983, 1985 and 1986 claims.

REASONS FOR GRANTING THE WRIT

Supreme Court rule 10(a) specifies the grounds upon which a writ should be granted. The two which apply here are 10(a), where the Court of Appeals has sanctioned a departure by the district

court from accepted and usual course of judicial proceedings and 10(c), where the Court of Appeals decided a federal question in a way that conflicts with applicable decisions of the Court.

A. THE THIRD CIRCUIT PERMITTED THE DISTRICT COURT TO IGNORE THE CLEARLY PLED ALLEGATIONS UNDER 42 U.S.C. §§1985 AND 1986.

Petitioner clearly pled his cause under 42 U.S.C. §§1985 and 1986. But the district court dismissed his complaint without ever considering the §§1985 and 1986 claims. Instead, the district court addressed only the §1983 claim.

42 U.S.C. §§1983, 1985 and 1986 are different statutes with different elements of proof. See pp. 4-5, supra. for text of these statutes.

The principal difference between §§1983, 1985 and 1986 is that §1983 requires proof of state action, whereas §§1985(3) and 1986 do not. See Griffin v. Breckenridge 403 U.S. 88, 91 S.Ct. 1790, ____ L.Ed.2d ____ (1971) which held that §1985(3) reaches purely private conspiracies to deprive persons of equal protection or immunities and privileges.

The district court reasoned that Respondents' actions did not constitute state action under §1983, to wit:

1) Antoinette Teneyck's participation in state court proceedings does not satisfy the state action requirement.

2) Ms. Teneyck's alleged assault of Petitioner, making excessive

phone calls, visits to his house, substituting her husband as father to Petitioner's children did not constitute state action.

3) Steven Teneyck's interference with Petitioner's parental rights, spying on him and denying access to his children is not state action.[4]

App. B at 15-17. The district court cited no other reason for dismissing the Teneycks, other than lack of state action.

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[4]The district court also held them immune as lay witnesses who testified in state court. This immunity is limited to damage liability for in-court statements. It does not extend to out-of-court conduct relating to conspiracy.

The district court dismissed Petitioner's Complaint sua sponte without having considered the §§1985 and 1986 claims which do not impose a state action requirement. The Third Circuit affirmed without opinion.

The Third Court's affirmance sanctioned an egregious departure from accepted judicial standards by allowing the district court to ignore the §§1985, 1986 claims. This Honorable Court should exercise its plenary power of supervision over the Court of Appeals and reverse and remand the cause for proper consideration by the district court under Supreme Court Rule 10(a).

B. PETITIONER'S PRO SE COMPLAINT STATES CAUSE OF ACTION UNDER 42 U.S.C. §1983 UNDER SETTLED SUPREME COURT PRECEDENT

1. The Complaint Passes Muster Under 12(b)(6) And As A Pro Se Pleading

Petitioner's Pro Se Complaint must be taken as true for the purposes of a Fed. R.Civ.P. 12(b)(6) motion to dismiss for failure to state a cause of action. Conley v. Gibson 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

In Conley v. Gibson, this Honorable Court held, in a civil rights case, that in appraising the sufficiency of a complaint, "we follow the accepted rule that a complaint should not be dismissed for failure to state a claim unless it

appears beyond doubt that the Plaintiff can provide no set of facts in support of his claim which would entitle him to relief." This Court held that the federal rules:

> "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that gives the defendant firm notice. This is notice pleading made possible by liberal discovery rules. All pleadings shall be construed to do substantial justice."

355 U.S. at 48, 78 S.Ct. at 103.

This Court rejected the idea that pleading is a "game of skill in which one misstep by counsel may be decisive to the outcome. . . " This court accepted the principle that the purpose of pleading is

to facilitate proper decision on the merits." Id.

In Scheuer v. Rhodes 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) this Court stated:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."

Indeed, this Honorable Court has required for twenty years that federal courts hold a pro se complaint to less stringent standards than pleadings by lawyers. Haines v. Kerner 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

In Estelle v. Gamble 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) this Court reversed a sua sponte dismissal under R. 12(b)(6) of a handwritten pro se complaint under §1983 citing both Haines v. Kerner, supra. and Conley v. Gibson, supra. As Justice Stevens said, the Haines test is not whether the facts alleged in the complaint would entitle the plaintiff to relief. "Rather, it is whether the Court can say with assurance on the basis of the complaint, that beyond any doubt, no set of facts could be proved that would entitle the

plaintiff to relief." 429 U.S. at 112, 97 S.Ct. at 295. Justice Stevens explained that a pro se complaint provides an unsatisfactory foundation for deciding the merits of important questions because it typically is inartfully drawn, unclear and equivocal. Id. Haines teaches, said Stevens, that the decision on the merits should normally be postponed until the facts have been ascertained. Id. at n.7.

Petitioner's Pro Se Complaint alleged the following facts, to be taken as true for the purposes of a motion to dismiss:

(1) The Teneycks repeatedly violated court orders directing them to make the children available for visits.

(2) They produced the children late or not at all.

(3) Mrs. Teneyck harassed Petitioner by calling the children hundreds of times while the children were visiting Petitioner.

(4) She would not cooperate with Petitioner when he wanted to take the children for visits with relatives.

(5) Mrs. Teneyck spied on him and stole property belonging to him.

(6) She refused to allow the children to speak with

Petitioner on the phone when they were at her home.

(7) Steven Teneyck abused Petitioner verbally and even assaulted him physically in front of Petitioner's children.

(8) They lied under oath in court.

(9) They failed to give Petitioner notice that they intended to take the children on vacation.

(10) Mrs. Teneyck instigated pled false charges against Petitioner.

(11) Mr. Teneyck prevented Petitioner from seeing his children.

(12) Most important, they conspired to substitute Steven Teneyck as the father of Petitioner's children.

See allegations against Janet Berson and Kenneth Domzalski at p. 12-15, supra.

These allegations are sufficient to withstand dismissal under settled Supreme Court precedent, sufficient to adequately allege a conspiracy to deprive Petitioner of custody of his own children.

2. The Third Circuit Disregarded Settled Supreme Court Precedent Regarding §1983

Petitioner's complaint raises vital constitutional rights, a father's right

to associate with his own children and participate in their parenting.

His conspiracy theory under §1983 has been accepted by federal courts in a domestic relations context. In Hooks v. Hooks 771 F.2d 935 941 (6th Cir. 1985) the court held it is well settled that parents have a constitutionally protected liberty interest in custody of their children, relying on Santosky v. Kramer 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982) (parents have fundamental liberty interest in care, custody and management of their children) and Stanley v. Illinois 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972).

Stanley held that the right to conceive and raise one's children is an

essential, basic civil right of man, a right far more precious than property rights citing Meyer v. Nebraska 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed 1042 (1923), Skinner and Oklahoma 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), May v. Anderson 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 122 (1953). See Rufalo v. Civiletti 702 F.2d 710 (8th Cir. 1983) (spouse's relationship with son part of liberty protected by due process clause). Any deprivation of that interest by the state must comport with due process. Id. at 941.

Petitioner alleges a conspiracy encompassing state judges and private persons, e.g., his former wife, her husband, attorneys for his former wife, and a court-appointed expert. Private

persons who join with state officials to deprive a person of civil rights act under color of state law for purposes of §1983. Hooks v. Hooks, supra. at 943, citing Lugar v. Edmondson Oil Co. 457 U.S. 922, 941, 102 S.Ct. 2744, 2755, 73 L.Ed.2d 482 (1982), Dennis v. Sparks 449 U.S. 24, 27-28, 101 S.Ct. 183, 2745, 66 L.Ed.2d 183 (1980) and Adickes v. Kress & Co. 398 U.S. 144, 150-152, 90 S.Ct. 1598, 1604-06, 26 L.Ed.2d 142 (1970).

This Honorable Court, in Dennis v. Sparks 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) held that a private party who conspires with a state court judge who is immune under §1983 acts under the color of state law. It is no consequence that the judge is immune. Immunity does not change the character of the judge's action or that of his co-

conspirators. "Judicial immunity was not designed to insulate the judiciary from all aspects of public accountability." 449 U.S. at 27-28, 101 S.Ct. at 186-187.

In Hooks v. Hooks, supra, the court held that §1983 would extend to the defendant spouse accused of a conspiracy to interfere with parental rights. 771 F.2d at 943. In Hooks, a former wife sued her ex-husband, her ex-husband's parents, two friends of her ex-husband, two sheriffs, civilian employees of the Sheriff's department and a state employee of the Tennessee Department of Human Services, alleging these parties conspired to and did deprive her of custody of her children without due process of law. The court defined a conspiracy as follows: an agreement between two or more persons to injure

another by unlawful actions. Express agreement among all conspirators is not necessary; each conspirator need not know all the details of the conspiracy. All that must be shown is a single plan, that an alleged co-conspirator shared in the general objective and that an overt act was committed. Id. at 944.

The Hooks court reversed a summary judgment in favor of the ex-husband under §1983 because the Complaint sufficiently alleged he conspired with a state actor to deprive the mother of custody.

Furthermore, in Humphrey v. Court of Common Pleas of York County 640 F.Supp. 1239 (M.D. Pa. 1986), the court held that a divorced father and his minor children could maintain a §1983 action against the father's attorney on the theory that the

attorney conspired with a state judge to deprive him of custody. The Court held that, although a private attorney does not act under color of state law while representing a client, a private person does act under color of state law when engaged in a conspiracy with state officials to deprive another of federal rights, citing Tower v. Glover 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984). The court held so even though it dismissed the judge under judicial immunity doctrine. See Dennis v. Sparks, supra.

See Agg v. Flanagan 855 F.2d 336 (6th Cir. 1988) in which the Court would have considered the divorced father's §1985(3) claim against his ex-wife, her attorney and a state judge, but dismissed the claim because facts pled did not

support a conspiracy, e.g., Plaintiff failed to allege that Defendants misled the court. In the instant case, Petitioner has clearly alleged that his former wife, her husband, attorneys and the court-appointed expert misled the court.

See Lloyd v. Loefler 694 F.2d 489 (7th Cir. 1982) holding, in diversity case, that child's mother, her husband and maternal grandparents conspired to interfere with plaintiff father's custody because they conspired to keep the child from the father; Cole v. Cole 633 F.2d 1083 (4th Cir. 1980) in which the court found genuine issues of fact precluded summary judgment under §1983 in a case similar to Petitioner's. In Cole, the divorced husband sued his former wife, a deputy sheriff, and a policeman under

§1983 alleging they conspired to harass him and that his former wife maliciously prosecuted him.

Petitioner's sixty-page Pro Se Complaint, considered under the Conley v. Gibson and Haines v. Kerner standards, certainly alleged sufficient facts to withstand a motion to dismiss under Fed. R.Civ. P. 12(b)(6) under §1983 and §1985, §1986. He alleged his former wife and her husband, their attorneys, and a court-appointed witness conspired with state judges to deprive him of a parental relationship. His Complaint contains enough facts to sustain a cause of action for a conspiracy under both §§1983 and 1985(3) under settled Supreme Court precedent, especially Dennis v. Sparks, supra.

Conclusion

The Third Circuit's affirmance of the district court's sua sponte dismissal violated long-settled applicable decisions of this Court: Conley v. Gibson, supra. and Haines v. Kerner, supra, and Dennis v. Sparks, supra. The Third Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

C. THE THIRD COURT'S AFFIRMANCE OF THE DISTRICT COURT'S SUA SPONTE DISMISSAL OF PETITIONER'S CLAIMS AGAINST HIS FORMER WIFE AND HER HUSBAND VIOLATED THE FIFTH AMENDMENT

The district court dismissed Petitioner's claims against his former

wife and her husband for failure to state a claim for which relief can be granted sua sponte without giving Petitioner notice or an opportunity to be heard. App. B. at 15. The Third Circuit affirmed and denied a petition for rehearing.

This issue raises a conflict among circuits as to whether district courts may dismiss a complaint sua sponte under Rule 12(b)(6) without giving the party notice and opportunity to be heard. The majority of circuits mandate notice and opportunity to be heard. This Honorable Court has not yet resolved the issue.

A district court may dismiss sua sponte under R. 12(b)(6), so long as the procedure employed is fair. 5A Wright & Miller Federal Practice and Procedure

§1357 at 301 (1990), citing some fifty cases. A court must give the plaintiff an opportunity to be heard. Perez v. Ortiz 849 8.2d 793, 797 (2d Cir. 1988). Failure to afford this opportunity to address the Court's sua sponte motion to dismiss is, by itself, grounds for reversal. Square D Co. v. Niagara Frontier Tariff Bureau 760 F.2d 1347, 1365 (2d. Cir. 1985) See extended discussion and citations supporting this point in Ricketts v. Midwest National Bank 874 F.2d 1177 (7th Cir. 1989).

Absent notice, the court deprives the parties moved against of the opportunity to present their best arguments in opposition and deprives plaintiffs of the opportunity to amend their complaints. Sua sponte dismissals, especially those entered without notice,

deviate from the traditions of the adversarial system by making the judge "a proponent rather than an independent entity." Perez v. Ortiz, supra. at 797. Finally, they produce a waste of judicial resources by spawning appeals and remands. Id.

Petitioner notes a conflict of circuits on this issue. The first, second, sixth, seventh and eleventh circuits have enforced strict notice requirements with respect to sua sponte dismissals under Rule 12(b)(6). But see the Ninth Circuit opinion in Omar v. Sealand Service, Inc. 813 F.2d 986, 991 (1987) and the District of Columbia Circuit in Baker v. Director, United States Parole Commission 916 F.2d 725 (1990) noting the conflict in circuits and holding sua sponte dismissals without

proper notice where claimant "cannot possibly win relief."

Even under the more permissive eleventh and District of Columbia circuit standards, the district court erred by not giving Petitioner notice and an opportunity to be heard because no court could have concluded that Petitioner could not possibly win relief at so early a stage of the litigation.

This Honorable Court has declined to rule on the propriety of sua sponte dismissals without notice and an opportunity to be heard under Rule 12(b)(6). See Neitzke v. Williams _____ U.S. _____ 109 S.Ct. 1827, 1834n.8, 104 L.Ed.2d 338 (1989). But the Third Circuit has indicated, without so holding, that it would follow those

circuits requiring notice and an opportunity to respond. Oatess v. Sobolevitch 914 F.2d 428, 430n.5 (3d Cir. 1990).

The district court never gave the pro se Petitioner any notice or opportunity to be heard before dismissing sua sponte his main antagonists, his former wife and her husband, the same persons who have spearheaded the conspiracy. This violated Petitioners right to procedural due process under the Fifth Amendment of the Constitution. See Jefferson Fourteenth Associates v. Wometco De Puerto Rico 695 F.2d 524 (11th Cir. 1983) (sua sponte dismissal of third party claims deprived party of procedural due process).

The district court deprived Petitioner of elementary procedural due process guaranteed by the Fifth Amendment. The Third Circuit summarily affirmed without opinion. This Honorable Court should grant a writ because the Third Circuit rendered a decision which conflicts with other circuit court decisions. The Supreme Court, heretofore silent, should resolve this conflict over this important constitutional issue.

CONCLUSION

The Third Circuit failed to give this case the thorough consideration it deserves. Its summary affirmance of the district court's clearly erroneous opinion decided federal questions that

conflict with this Court's precedent regarding the applicable standard for 12(b)(6) motions, interpretation of pro se complaints, and §1983 standards for conspiracies.

The Third Circuit has departed from accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Furthermore, the issue of sua sponte dismissals has created a split among circuits which ought to be resolved by this Court.

This Honorable Court should grant this writ and reverse and remand to the Third Circuit with instructions to remand

to the district court for discovery and jury trial.

Respectfully submitted,

Robert B. Gidding
Attorney for Petitioners

DATED: 4/15/91

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5405

DANIEL-MARC AUGER; CHANTAL-MARISE AUGER,
all minors, by their father, next friend,
and natural guardian; RAYMOND AUGER

v.

ANTOINETTE TENEYCK, individually;
STEVEN TENEYCK, individually;
DR. JANET BERSON, individually;
KENNETH S. DOMZALSKI, individually and
as an employee of the law firm of
Bookbinder, Guest and Domzalski;
BRIAN GUEST, individually and
as an employee of the law firm of
Bookbinder, Guest and Domzalski;
LU-ANN WATSON and PAUL SNYDER,
individually and as employees
of the law firm of
Marshall, Dennehey, Warner, Coleman
and Goggin;
DR. JULIAN FREEMAN, individually;
JUDGE JAMES A. YOCUM,
Municipal Court Judge
of Moorestown, New Jersey;
JUDGE CORNELIUS SULLIVAN;
JUDGE MARTIN HAINES;
JUDGE MYRON GOTTLIEB;
JUDGE VICTOR FRIEDMAN, individually
and as Superior Court Judges of
New Jersey; JUDGE MICHAEL KING;
JUDGE WARREN BRODY;
JUDGE WILLIAM D'ANNUNZIO;

JUDGE ROBERT MUIR, individually and as judges of New Jersey Appellate Court; CHIEF JUSTICE ROBERT WILLENTZ, individually and as Judge of the Supreme Court of New Jersey

Raymond Auger, Daniel-Marc Auger and Chantal-Marise Auger

Appellants

On Appeal from the United States District Court for the District of New Jersey
(D.D. Civil No. 89-03082)
District Judge: Hon. John C. Lifland

Submitted Under Third Circuit Rule 12(6)
November 7, 1990

Before: SLOVITER, HUTCHINSON and ALITO, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by Appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Appellants' request for an injunction pendente lite is hereby denied as moot. Costs taxed against appellants.

By the Court,

_____
Circuit Judge

Attest:

_____
Sally Mrvos, Clerk

Dated: Nov 26 1990

Costs taxed in favor of Paul Snyder and Lu Ann Watson, appellees as follows:

TOTAL OF BRIEF.....$254.97

Costs taxed in favor of Brian Guest, appellee as follows:

TOTAL OF BRIEF
AND APPENDIX.....$128.50

Certified as a true copy and issued in lieu of a formal mandate on January 25, 1991.

Test: **Sally Mrvos**

Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL-MARC AUGER, ET AL.,	:	
	:	CIVIL ACTION
PLAINTIFFS,	:	NO. 89-3082 (JCL)
	:	
v.	:	**MEMORANDUM**
	:	**AND ORDER**
ANTOINETTE TENEYCK, ET AL.,	:	
	:	
DEFENDANTS	:	

LIFLAND, District Judge

Raymond Auger brings this pro se civil rights action individually and on behalf of his two minor children. The crux of the complaint is that the defendants have violated Raymond Auger's constitutional rights to have a relationship with and custody of his

children without due process and equal protection of the laws.[1]

Plaintiffs seek monetary damages an a variety of injunctions, including vacating state court orders. Plaintiffs also raise a pendent state law claim of intentional infliction of emotional distress.

At the heart of this action is a matrimonial dispute between Raymond Auge and his former wife, Antoinette Teneyck. That action involved a custody battle over the couple's two children. Mr. Auger's dissatisfaction with the disposition of the custody proceedings

---

[1]The complaint also alleges tha defendants have violated 18 U.S.C. §§ 241 242 and 371. While Sections 241 and 24 related to deprivation of civil rights there is no private right of action unde these statutes. See, e.g., Dugar v Coughlin, 613 F. Supp. 849, 851 n. (S.D.N.Y.). Section 371, addressed t conspiracies against the United States, i inapposite.

culminated in his filing suit in the Superior Court of New Jersey, Law Division, against Ms. Teneyck, her current husband Steven Teneyck, a court appointed psychologist and two attorneys who participated in the matrimonial action. The Superior Court dismissed all claims except a claim alleging the Mr. Teneyck physically assaulted Mr. Auger.

After presenting his grievances to "six state judges, six appellate judges, the (C)hief (J)ustice of the New Jersey Supreme Court, ... the state judiciary committee, the attorney general's office, (and) the ethics committee..."[2] , Raymond Auger seeks redress in this court. Named as defendants in this proceeding are the Teneycks; Dr. Janet Berson, the court appointed psychologist in the custody

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[2]Plaintiffs' Discovery Memorandum of Legal Issues at 13.

proceedings; Kenneth Domzalski, Esq. and Brian Guest, Esq., counsel to Ms. Teneyck; Lu-Ann Watson, Esq. and Paul Snyder, Esq., counsel to Dr. Berson; Dr. Julian Freeman, an orthodontist; the Honorable James Yocum, a municipal court judge; and thirteen members of the New Jersey judiciary.

Presently before the court are the following motions:

A. motion by defendant members of the judiciary to dismiss the complaint for failure to state a claim upon which relief can be granted;

B. motion by defendants Paul Snyder, Esq. and Lu Ann Watson, Esq. to dismiss the complaint for failure to state a claim upon which relief can be granted;

C. motion by defendant Dr. Julian Freeman for summary judgment;

D. motion by plaintiffs for entry of default and default judgment against defendants Antoinette Teneyck, Steven Teneyck, Kenneth Domzalski, Esq., Brian Guest, Esq. and Dr. Janet Berson; and,

E. motion by plaintiffs to Restore the Civil Rights of Plaintiffs.

For the following reasons, the court grants defendants' motions and denies plaintiffs' motions.

A. MOTION BY DEFENDANT MEMBERS OF THE JUDICIARY TO DISMISS THE COMPLAINT

1. Damages

In Stump v. Sparkman 435 U.S. 349 (1978), the Supreme Court held that state judges are immune from §1983 liability for "judicial" acts not taken "in the 'clear absence of all jurisdiction.'" Id., at 357 (quoting Bradley v. Fisher 80 U.S. (13 Wall.) 335

(1972). The Stump Court identified two specific factors to be considered in determining whether an act is "judicial": "...the nature of the act itself, i.e., whether it is a function normally performed by a judge, and...the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." 435 U.S. at 362.

All of the allegations against the judicial defendants relate to the disposition of matters brought before them by Raymond Auger or Antoinette Teneyck.

Judge Martin Haines presided over the matrimonial action. The complaint alleges that Judge Haines violated Raymond Auger's constitutional rights through orders which determined custody of the children, visitation, required Mr. Auger to attend family

counselling, and required Mr. Auger to pay attorney's fees. Judge Haines allegedly denied Raymond Auger's motion to restrain Steven Teneyck from interfering in parental matters and refused to hear a charge that Mr. Teneyck had assaulted Mr. Auger. The complaint also alleges that Judge Haines denied Mr. Auger rebuttal time on one motion and refused to hear testimony from some of his witnesses.

Judge Anthony Tunney allegedly refused to review the custody order.

Judge Dominick Ferrelli presided over the state proceedings Mr. Auger brought against the Teneycks, Dr. Berman and her legal counsel. The complaint alleges that Judge Ferrelli heard a motion out of time and assessed attorney's fees against Raymond Auger.

Judge Cornelius Sullivan is charged with granting a restraining orde in violation of Mr. Auger's constitutional rights.

Judges Michael King, Warren Brody, Julia Ashbey, James Coleman, William D'Annunzio, Robert Muir and Chie Justice Robert Wilentz are named for denying Raymond Auger's appellate applications relating to the custody battle and his separate civil suit.

Judge James Yocum presided ove a trial in Moorestown Municipal Court in which Raymond Auger was charged with trespass and simple assault. Mr. Auger was found guilty of trespass. The complaint alleges Judge Yocum penalized Mr. Auger for trying to visit his children.

All of the actions alleged in the complaint were "judicial" acts.

Rendering orders, making rulings on evidentiary matters and controlling dockets are functions normally performed by judges. In addition, the parties dealt with the defendants in their judicial capacities in all proceedings. Finally, each defendant had jurisdiction over the matter before him or her.

The court holds that all named judicial defendants are immune from §1983 liability for damages.

2. Injunctive Relief

Plaintiffs cite Pulliam v. Allen 466 U.S. 522 (1984) for the proposition that judicial immunity is not a bar to prospective injunctive relief against a judicial officer. The injunctive relief plaintiff requests is to modify or vacate the orders of the state court.

United States District Courts have no jurisdiction "over challenges to State Court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in [the Supreme Court]. 28 U.S.C. §1257." District of Columbia Court of Appeals v. Feldman 460 U.S. 462, 482 (1983). Mr. Auger's sole recourse is to the United States Supreme Court to redress any alleged constitutional error in the decisions of the New Jersey courts.

B. MOTION BY PAUL SNYDER, ESQ. AND LU ANN WATSON, ESQ. TO DISMISS THE COMPLAINT

Mr. Snyder and Ms. Watson represented Dr. Berson in the state court proceedings brought by Mr. Auger. The

only allegation in the complaint against these two defendants states:

> All persons named herein, including attorney's Guest, Watson and Snyder contributed to the denial and/or obstruc- of justice to the Plaintiffs, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

Complaint, "Overt Acts" at ¶ 78.

In this Circuit, a civil rights complaint under §1983 must set forth with factual specificity the conduct of defendants alleged to have harmed the plaintiff. Ross v. Meagan 638 F.2d 646, 650 (3d Cir. 1981); Rotolo v. Borough of Charleroi 532 F.2d 920, 922 (3d Cir. 1976). While this court must liberally construe pro se pleadings, Haines v. Kerner 404 U.S. 519 (1972), the complaint is devoid of facts supporting its conclusory claim that defendants Watson

and Snyder violated plaintiffs' constitutional rights.

Moreover, the Civil Rights Act does not create a remedy for all conduct that may result in a violation of rights privileges or immunities secured by the Constitution of the United States. Its reach is limited to action taken "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . ." 42 U.S.C. §1983.

Mr. Snyder's and Ms. Watson's mere participation in the state court proceedings does not constitute state action. See Stewart v. Meeker 459 F.2d 669 (3d Cir. 1972) (privately retained counsel acts as a private person in his or her representation of clients). See also, Donlan v. Smith 662 F.Supp. 352 (D. Md. 1986).

This reasoning is equally applicable to defendants Kenneth Domzalski, Esq. and Brian Guest, Esq. Messrs. Domzalski and Guest represented Antoinette Teneyck in the state court proceedings. The allegations against Mr. Domzalski include his filing a motion, sending Mr. Auger a harassing letter, lying in court, threatening Mr. Auger with jail and trying to "choose" a judge. The only allegation against Mr. Guest is asserted in ¶78 quoted above. The conduct alleged does not constitute state action within the meaning of the Civil Rights Act. Accordingly, the complaint is dismissed as to defendants Paul Snyder, Lu Ann Watson, Kenneth Domzalski and Brian Guest.

C. MOTION BY DR. JULIAN FREEMAN FOR SUMMARY JUDGMENT

Dr. Freeman is an orthodontist The complaint alleges that Dr. Freeman violated plaintiffs' constitutional rights by making an appointment to examine the children in contravention of the written objections of Mr. Auger. Dr Freeman's unopposed affidavit indicates that he saw the Auger children once to conduct an initial examination. While h made two other appointments to treat the children, he never saw them again. Afte receiving correspondence from Raymond Auger, Dr. Freeman informed Ms. Teneyck' attorney that he was unwilling to perfor the orthodontic work.

The court finds no state actio in this conduct. Dr. Freeman's motion for summary judgment is granted.

D. PLAINTIFFS' MOTION FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT

Plaintiffs have moved for entry of default and default judgment against Antoinette Teneyck, Steven Teneyck, Kenneth Domzalski, Brain Guest, and Dr. Janet Berson. As the court has dismissed the complaint as to defendants Kenneth Domzalski and Brian Guest, the motion for default against them is moot.

On its own motion, the court dismisses the complaint as to Antoinette and Steven Teneyck for failure to state a claim upon which relief may be granted, thereby mooting plaintiffs' default motion as to them.

The complaint alleges that Antoinette Teneyck violated plaintiffs' rights by her participation in the state court proceedings. Specifically, plaintiffs charge that Antoinette Teneyck

violated plaintiffs' rights by filing various applications for relief in the state proceedings. The mere fact that a private party initiates legislation does not satisfy the state action requirement. Daniel v. Ferguson 689 F.2d 1124, 1130 (5th Cir. 1988); Weisman v. Sherry 514 F. Supp. 728, 733-34 (M.D. Pa. 1981).

The complaint also alleges that both Antoinette and Steven Teneyck lied under oath. Lay witnesses are absolutely immune from damages liability based on their testimony in judicial proceedings. Briscoe v. LaHue 460 U.S. 328 (1983).

In addition, the complaint charges Ms. Teneyck with violating state court orders by assaulting Mr. Auger, deliberately spying on him, making excessive phone calls and visits to his house, and substituting Steven Teneyck as the "father" of the children. Ms.

Teneyck's alleged violation of state orders does not constitute state action as the state did not sanction alleged abuse of otherwise valid state laws.

Finally, plaintiffs allege Steven Teneyck violated their civil rights by interfering with Raymond Auger's parental rights, spying on Raymond Auger, and denying Mr. Auger access to his children. This conduct is not state action for purposes of 42 U.S.C. §1983.

The court denies plaintiffs' motion for default judgment as to Dr. Janet Berson. This court has discretion to grant additional time to a party to plead or to otherwise defend. See Orange Theater Corp. v. Rayhersty Amusement Corp. 139 F.2d 871 (3d. Cir.), cert. denied 322 U.S. 740 (1942). See also, Fed. R. Civ. P. 6(b). In opposition to

plaintiffs' motion, Dr. Berson has indicated that she was required to seek new counsel as Lu-Ann Watson, Esq. and Paul Snyder, Esq. were named as defendants in this action. It took approximately forty-five days for her insurance carrier to retain new counsel. Such delay is not unreasonable and no prejudice to the plaintiffs is alleged.

On its own motion, the court has examined the claims against Dr. Berson. The court questions whether Dr. Berson is a state actor under 42 U.S.C. §1983, See Hall v. Quillen 631 F.2d 115 (4th Cir. 1980) (holding court-appointed physician is not a state actor). On the appropriate motion, the court will consider this issue further.

E. PLAINTIFFS' MOTION FOR RESTORATION OF CIVIL RIGHTS

The proposed order submitted in connection with plaintiffs' motion for Restoration of Civil Rights requests that "Joint, Physical and Legal Custody be immediately restored in full" and that "custody changes shall occur at 7:00 p.m. on Friday nights of each week."

As discussed above, this court has no authority to sit in direct review of state court decisions. The motion is denied.

Accordingly,

IT IS on this 6th day of April, 1990, ORDERED that the complaint is dismissed as to all defendant members of the judiciary for failure to state a claim upon which relief may be granted; and

IT IS FURTHER ORDERED that the complaint is dismissed as to defendants Paul Snyder, Esq., Lu Ann Watson, Esq., Kenneth Domzalski, Esq., and Brian Guest, Esq. for failure to state a claim upon which relief may be granted; and

IT IS FURTHER ORDERED that Dr. Julian Freeman's motion for summary judgment is granted; and

IT IS FURTHER ORDERED that the complaint is dismissed as to Antoinette Teneyck and Steven Teneyck for failure to state a claim upon which relief may be granted; and

IT IS FURTHER ORDERED that Dr. Janet Berson may file a responsive pleading by April 15, 1990.

JOHN C. LIFLAND
United States
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5405

DANIEL-MARC AUGER; CHANTAL-MARISE AUGER,
all minors, by their father, next friend,
and natural guardian; RAYMOND AUGER

v.

ANTOINETTE TENEYCK, individually;
STEVEN TENEYCK, individually;
DR. JANET BERSON, individually;
KENNETH S. DOMZALSKI, individually and
as an employee of the law firm of
Bookbinder, Guest and Domzalski;
BRIAN GUEST, individually and
as an employee of the law firm of
Bookbinder, Guest and Domzalski;
LU-ANN WATSON and PAUL SNYDER,
individually and as employees
of the law firm of
Marshall, Dennehey, Warner, Coleman
and Goggin;
DR. JULIAN FREEMAN, individually;
JUDGE JAMES A. YOCUM, Municipal Court
Judge of Moorestown, New Jersey;
JUDGE CORNELIUS SULLIVAN;
JUDGE MARTIN HAINES;
JUDGE MYRON GOTTLIEB;
JUDGE VICTOR FRIEDMAN, individually
and as Superior Court Judges of
New Jersey; JUDGE MICHAEL KING;
JUDGE WARREN BRODY;
JUDGE WILLIAM D'ANNUNZIO;
JUDGE ROBERT MUIR, individually

ROBERT WILLENTZ, individually and as
Judge of the Supreme Court of New Jerse

Raymond Auger, Daniel-Marc Auger and
Chantal-Marise Auger

Appellants

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, Chief Judg
SLOVITER, BECKER, STAPLETO
MANSMANN, GREENBERG, HUTCHINSO
SCIRICA, COWEN, NYGAARD a
ALITO, Circuit Judges

The petition for rehearing filed by Appellants Raymond Auger, Daniel-Marc Auger and Chantal-Marise Auger

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: Jan 25 1991

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Auger et al., vs.
TenEyck at al.,
Docket No. 90-5405

Motion for Immediate Jury trial
Petition for Rehearing
Request for Rehearing in Banc

The USC (455(a)) stat es unequivocably: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned."

Since this suit involves also fourteen judges and four lawyers, it is obvious that the integrity of the so-called Justice System is at stake. Refusing a jury trial is viewed not only at denial of justice but also obstruction

Panel decision received on November 20, 1990 at c. 1:00 p.m.

of justice. Zsa Zsa Gabor is given a jury trial for slapping a police officer. Oliver North is given a jury trial for supposedly lying to Congress. Raymond Auger is refused a jury trial for violations of his, and his children's, civil rights: Raymond Auger is denied his fundamental rights to be a parent!

The civil rights of Raymond Auger and of his children have been willfully, knowingly and deliberat ely violated. Due process is systematically denied; so is "equal protection of the laws".

A denial of a jury trial by judges when the claims involve violations of Constitutional Rights by their colleagues is a conspiracy to deny justice - a civil right.

If Judges have moral integrity, they have no choice but let justice be done,

let the victims be heard once in front of a jury of their peers; let a jury decide.

We REQUEST A JURY TRIAL IMMEDIATELY.

The denial of justice at this point is for reasons of:

a) Gender: the Plaintiff is a Male Parent;

b) Career: the Plaintiff is Pro Se and not an attorney;

c) Citizenship: the Plaintiff is a Canadian citizen and not an American Citizen. The Children are both Canadian and American citizens. The Constitution applies to "every resident of the United States and its territories" (Title 42).

A father has a constitutional right to his property, be it his car, his house, his boat, etc...if those rights were denied without due process and without a jury trial, this Court would not hesitat e to restore his rights guaranteed by the Constitution of the United States, including the Bill of Rights.

The Constitutionality of the parent-child relationship has been established by many U.S. Supreme Court rulings. Among those, we quote:

May v. Anderson, 73 S. Ct. 840 (1952): The U.S. Supreme Court has cast away any doubt that parent's desire for and right to "the companionship, care, custody and management of his or her children" is an interest that is "far more precious" than any property right.

Stanley v. Illinois, 92 S. Ct. 1208 (1972); A parent's interest in the

companionship, care custody and management of his or her children rises to a constitutionally-secured right, given the centrality of family life as the focus for personal meaning and responsibility.

Meyer v. Nebraska, 43 S. Ct. 625 (1923): Parental rights have been recognized as being "essential to the orderly pursuit of happiness by free men".

Sullivan v. Walcott, 98 S. Ct. 549, 434 Y.S. 246, at 255-256 (1978): The Supreme Court implied that "a (once) married father who is separated or divorced from the mother and is no longer living with his child should not constitutionally be treated differently from a currently married father living with his child.

Franz v. United States, 707 F.Ed. 582 at 595 (1983): "a parent's right to the preservation of his relationship with his

child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his children. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsible, reliable adult. (599).

Kelson v. Springfield, 85 Daily Journal D.A.R. 2802 at 2803 (1985). The court held that the parent-child relationship is a constitutionally-protected liberty interest (Declaration of Independence - life, liberty, and pursuit of happiness: the 14th Amendment of the U.S. Constitution - No State can deprive any person of life, liberty or property without due process of law, nor deny any

person the equal protection of the laws.) Any deprivation of that right is actionable under Title 42 U.S.C. § 1983 and the offended party can sue under this statute for damages for violations of the parent-child relationship. (Ninth Circuit Court of Appeals).

When no less than six of the first fourteen Amendments of the Constitution are systematically violated at the instigation of the mother and others to deprive the father and children of their "constitutionally-secured" rights, denial of a civil right to a jury trial is a further violation of the first law of the Country, the Constitution of the U.S. At such point, this document is voided of any meaning and becomes mere graffiti on a piece of meaningless paper.

It is obvious to the Plaintiffs that none of the twenty-five constitutional/ legal issues have been addressed to by the three judges of the court of appeals. Or if they did, they refuse to uphold the law because the Plaintiff-Father is a male - as opposed to female - parent, a Pro Se Plaintiff with no legal representation by the bar. On that basis, we consider the shortcoming of the ruling discriminatory on the basis of sex and career.

REHEARING IN BANC

The Plaintiff's request is a matter of constitutional rights, the right to full protection of his and children's rights to peace, privacy, happiness, protection against harassment, cruelty, cruel and unusual punishment, restoration of parent-children relationship, due process and equal protection of the laws (9.3.1)

The panel's decision is denial of justice and obstruction of justice. It appears that the panel is more concerned about protecting its own peers - judges and lawyers - than enforcing the Law of the Country (9.3.2).

The issue is the application and the protection of the Constitution which supersedes any state law (9.3.3).

The panel's decision is contrary to the Constitution and rulings of the Supreme Court of the United States. The decision hereby requested is to apply to the majority the the male population of the United States, that is, the rights to be fathers, the rights to be parents, the right to equal treatment under the law (14th Amend.).

_____

Raymond Auger, Pro Se

Dated: December 10, 1990

SERVICE:

Copies of Petition for Rehearing have been forwarded to all parties:

- Barbara J. Davis
- Brian M. Guest,
- Modestino Carbone
- Jeffrey A. Weiner
- William P. Shelley
- Thomas D. Flinn

_____

Raymond Auger, Pro Se

Dated: December 10, 1990

APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION FILE NO. 89-3082 (JCL)

DANIEL-MARC AUGER; CHANTAL-MARISE AUGER, all minors, by their father, next friend, and natural guardian; RAYMOND AUGER

Plaintiffs

v.

ANTOINETTE TENEYCK, individually;
STEVEN TENEYCK, individually;
DR. JANET BERSON, individually;
KENNETH S. DOMZALSKI, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski;
BRIAN GUEST, individually and as an employee of the law firm of

Bookbinder, Guest and Domzalski;
LU-ANN WATSON and PAUL SNYDER,
individually and as employees
of the law firm of
Marshall, Dennehey, Warner, Coleman
and Goggin;
DR. JULIAN FREEMAN, individually;
JUDGE JAMES A. YOCUM, Municipal Court
Judge
of Moorestown, New Jersey;
JUDGE CORNELIUS SULLIVAN;
JUDGE MARTIN HAINES;
JUDGE MYRON GOTTLIEB;
JUDGE VICTOR FRIEDMAN, individually
and as Superior Court Judges of
New Jersey; JUDGE MICHAEL KING;
JUDGE WARREN BRODY;
JUDGE WILLIAM D'ANNUNZIO;
JUDGE ROBERT MUIR, individually
and as judges of New Jersey
Appellate Court; CHIEF JUSTICE

ROBERT WILENTZ, individually and as

Judge of the Supreme Court of New Jersey

STATEMENT OF FACTS

All of the facts herein contained deal with substantial federal questions that have arisen during the course of events.

1. In 1986, the Plaintiffs were denied their rights to a relationship equal to that of the mother; Raymond Auger was denied equal parental rights. This is a violation of the fifth, eighth and fourteenth amendments of the Constitution of the United States.

2. The order, signed by Judge Martin Haines, unjustly curtailed Raymond Auger's parental rights and effectively changed his status as a parent to that of a visitor without clear and convincing evidence, or any societal necessity. This is a violation of the first, fifth,

eighth and fourteenth amendments of the Constitution.

3. In December 1987, Judge Anthony Tunney was made aware of the violations of the constitutional rights of the Plaintiffs by Antoinette TenEyck and Steven TenEyck; Judge Tunney was also aware of the violations of due process and equal protection by Dr. Janet Berson and Judge Haines. Judge Tunney refused to review the custody order, thereby denying the Plaintiffs their constitutional rights under the first, fourth, eighth and fourteenth amendments.

4. In 1989, the Appellate Court, in reviewing Raymond Auger's case, refused to address the significant federal questions that were put before it. The Court did not comment on the

fact that Antoinette TenEyck and Steven TenEyck had perjured themselves in the courtroom, nor on the fact that Judge Anthony Tunney ruled against Raymond Auger without taking note of the evidence presented to him. The Court ignored the fact that Dr. Janet Berson, the court-appointed psychologist, deliberately discriminated against the father, in violation of the first, fifth, eighth, thirteenth and fourteenth amendments.

5. In February, March, April and May 1989, Judge Dominick Ferrelli not only ordered by forced Raymond Auger to abdicate his parental rights. Mr. Auger was threatened with incarceration and heavily penalized with attorney's fees for requesting the court to protect his parental rights. This is a violation of

the fifth, eighth, thirteenth and fourteenth amendments.

6. In May 1989, Antoinette TenEyck, Steven TenEyck and Kenneth S. Domzalski, Esq. conspired to defraud Raymond Auger of his civil rights as protected by the first amendment of the United States Constitution.

7. Antoinette TenEyck, Steven TenEyck and Kenneth Domzalski have perjured themselves numerous times during the course of these proceedings. The Court refuses to take action against them, instead ruling in their favor 100 percent of the time, in violation of the fifth and fourteenth amendments.

8. Antoinette TenEyck and Steven TenEyck, with the support and knowledge

of Kenneth Domzalski, have regularly violated court orders. The Court refuses to note and punish these violations. This violates the fifth and fourteenth amendments.

9. Steven TenEyck assaulted and battered Raymond Auger while Mr. Auger was exercising lawful custody rights to his children. The Court, namely Judge Martin Haines, refused to hear about this, in violation of the first, fifth, eighth and fourteenth amendments.

10. Kenneth Domzalski has repeatedly harassed Raymond Auger, who sought relief from same with the Court. Judge Myron Gottlieb denied Mr. Auger's request, in violation of the first, fifth, eighth and fourteenth amendments.

11. Raymond Auger has exhausted all of his means and remedies in attempting to correct the above-described situation. Raymond Auger has petitioned the State Courts and State agencies. He has been met with bias and prejudice. There appears to be one set of laws for Antoinette and Steven TenEyck and Kenneth Domzalski, and another for Raymond Auger. This violates the fifth and fourteenth amendments of the United States Constitution.

RIGHTS OF CHILDREN AND PARENTS

The U.S. Supreme Court has cast away any doubt that parent's desire for and right to "the companionship, care, custody and management of his or her children" is an interest that is "far

more precious" than any property right. May v. Anderson, 73 S.Ct. 840 (1952)

A parent's interest in the companionship, care custody and management of his or her children rises to a constitutionally-secured right, given the centrality of family life as the focus for personal meaning and responsibility. Stanley v. Illinois, 92 S.Ct. 1208 (1972)

Parental rights have been recognized as being "essential to the orderly pursuit of happiness by free men". Meyer v. Nebraska, 43 S.Ct. 625 (1923)

In Quilloin v. Walcott, 98 S.Ct. 549, 434 U.S. 246, at 255-256 (1978), the Supreme Court implied that "a (once) married father who is separated or

divorced from the mother and is no longer living with his child could not constitutionally be treated differently from a currently married father living with his child.

See also Franz v. United States, 707 F.Ed. 582 at page 595 (1983). In the Franz case it was observed:...a parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his children. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsible, reliable adult. At page 599.

In Watts v. Watts, the (NY) Family Court, Sybil Hart-Kooper, held that any presumption that "mother should have (more) custody of children...violates state law and was unconstitutional..." Also: "it is indisputable that each parent's interests, their relationship with rearing and custody of their children are of substantial importance." Persons, similarly situated, whether male or female, must be accorded evenhanded treatment of the law. Watts v. Watts, 350 NYS 2d 285 (1973)

Title 9 of the New Jersey Statutes Annotated, Chapter 2, Section 4 (N.J.S.A. 9:2-4) states in part the following: "in making an order or judgment relative to the custody of the children pending a controversy between the parents, or in regard to their final possession, the

rights of both parents, in the absence of misconduct, shall be held to be equal, and they shall be equally charged with their care, nurture, education and welfare..."

In a recent 9th Circuit Court of Appeals (California) decision, the court held that the parent-child relationship is a constitutionally-protected liberty interest (Declaration of Independence - life, liberty, and the pursuit of happiness; the 14th Amendment of the U.S. Constitution - No state can deprive any person of life, liberty or property without due process of law, nor deny any person the equal protection of the laws.) Any deprivation of the right is actionable under Title 42 U.S.C. #1983 and the offended party can sue under this statute for damages for violations of the

parent-child relationship. Kelson v. Springfield, (9th Cir.) 85 Daily Journal D.A.R. 2802 at 2803 (1985).

1. INTRODUCTION

This is a civil action seeking monetary damages and declaratory and injunctive relief from current and imminent enforcement of unconstitutional statutes and court rules of the State of New Jersey that are fair on their face but discriminatory as applied, and to enjoin groundless and unconstitutional civil actions brought against Plaintiff Raymond Auger and directly affecting him and Plaintiffs Daniel-Marc Auger and Chantal-Marise Auger, which are adversely affecting the mental and physical health and well-being of, and intentionally inflicting emotional distress on, all the

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Plaintiffs; and also inflicting great humiliation, embarrassment and stigma on, and injury to, the professional ability of Plaintiff Raymond Auger.

The Defendants, and others unknown to the Plaintiffs at this time, at all times pertinent to this complaint have acted in concert under the color of the laws of New Jersey to deny Plaintiffs the equal protection of the law and due process of law, to interrupt, to curtail and terminate the parental rights of Plaintiff Raymond Auger, to prevent, frustrate, curtail and terminate the mutual care, company, love and affection of the Plaintiff's rights, privileges, and immunities secured by the United States Constitution and laws under color of statutes, ordinances, custom and usage of the State of New Jersey.

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2. JURISDICTION

Plaintiffs bring this action to protect their rights under, and this Court has jurisdiction under, the Constitution of the United States and its First, Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments: Title 18 U.S. Code Sections 241, 242 and 371; Title 28 U.S. Code Sections 1331, 1343, 2201, 2281, 2284 and 1443 (hostile state legislature denies equal protection and interferes with right of defense); Title 42, U.S. Code Sections 1983, 1985, 1986 and 1988; the "life, liberty, and pursuit of happiness" phrase of the Declaration of Independence; the Constitution and laws of New Jersey, including those concerning cruelty to children and obstruction of justice; and the common law. The amount in

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controversy exceeds the sum of ten thousand dollars ($10,000), exclusive of interest and costs. The Plaintiffs have no other recourse in law, and cannot vindicate their rights in the courts of New Jersey.

3. PARTIES

All individual parties are residents of the United States and of New Jersey. James A. Yocum is municipal court judge of Moorestown. Cornelius Sullivan, Martin Haines, Anthony Tunney, Dominick Ferrelli, Myron Gottlieb, and Victor Friedman are judges of the Superior Court of New Jersey, Burlington County, New Jersey, acting at all times described herein under color of state law. Michael King, Warren Brody, Julio Ashbey, James Coleman, William D'Annunzio, Robert Muir

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are judges of the Appellate Court of New Jersey, acting at all times described herein under color of state law. Robert Wilentz is judge of the Supreme Court of New Jersey, acting at all times described herein under color of state law. Kenneth S. Domzalski, Brian Guest, Ann Watson, Paul Snyder are attorneys licensed to practice law in the state of New Jersey, acting at all times described herein under color of state law. Dr. Julian Freeman is an orthodontist, licensed to practice in the state of New Jersey, acting at all times described herein under color of state law. Dr. Janet Berson is a court-appointed psychologist, licensed to practice in the state of New Jersey, acting at all times described herein under color of state law. Antoinette TenEyck is the former wife of Raymond Auger and mother of Daniel-Marc

Auger and Chantal-Marise Auger. Steven TenEyck is the present husband of Antoinette TenEyck. Raymond Auger is the father, next friend and natural guardian of the Plaintiffs, Daniel-Marc Auger and Chantal-Marise Auger.

4. OVERT ACTS

1. On April 28, 1983, an Equal Custody Order was entered by Judge Martin Haines awarding equal custody of the two minor children to both parents, Raymond Auger and Antoinette TenEyck. At the end of the trial, Judge Haines explicitly encouraged Antoinette TenEyck to come back to court and request more custody in violation of New Jersey laws and of the Fourteenth Amendment of the Constitution of the U.S.

2. From the following Sunday, through Sunday, January 22, 1984, Antoinette TenEyck disobeyed the court order to surrender custody of the children to the father, denying the father prompt custody of his children, thereby using the children to harass the father, violating the Plaintiff's right to peace and happiness and inflicting severe emotional distress to the Plaintiffs, in violation of the First and the Fourteenth Amendments of the U.S. Constitution.

3. On Sunday, January 22, 1984, Raymond Auger was denied custody of his children. Raymond Auger was assaulted by Antoinette TenEyck and her mother, in violation of the First and Fifth Amendments of the U.S. Constitution.

4. On February 6, 1984, Antoinette TenEyck filed for a restraining order against Raymond Auger. Antoinette TenEyck falsely accused Raymond Auger of violence. Judge C. Sullivan granted the restraining order without convincing evidence, on the Defendant's word only, in violation of the First and Fourteenth Amendments of the Constitution of the U.S. The action of Antoinette TenEyck caused the Plaintiffs harassment, emotional distress, loss of work and sleep time in violation of the First and Fourteenth Amendments of the Constitution of the U.S.

5. Antoinette TenEyck falsely filed an assault and battery charge against Raymond Auger on March 27, 1984. Antoinette TenEyck's mother filed trespass charges against Raymond Auger.

Raymond Auger had a court order to pick up the children at Antoinette TenEyck's mother's house on Sunday morning, January 22, 1984. Antoinette TenEyck, by refusing to surrender the children, was disobeying a court order. Police officers were involved. Judge James Yocum rewarded the mother for disobeying a court order and for harassing the Plaintiffs; Judge Yocum penalized Raymond Auger for obeying a court order, in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

6. The rights of privacy of the Plaintiff were constantly violated by Antoinette TenEyck, more specifically during 1984 and 1985. Excessive phone calls to the children, coming to the Plaintiff's house several times a week,

often several times a day, deliberate spying by Antoinette TenEyck and Steven TenEyck (between 150 and 200 times) during 1984-1985, thereby denying the Plaintiff peace and privacy, in violation of the First Amendment of the Constitution of the U.S.

7. On November 26, 1984, Antoinette TenEyck filed for full custody, made false allegations to the court, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

8. Antoinette TenEyck constantly harassed the Plaintiff from April 1983 through April 1986 by calling hundreds and hundreds of times, denying Raymond Auger his privacy with his children.

This is in violation of the First Amendment of the Constitution of the U.S.

9. Judge Haines was made aware of the harassment tactics of Antoinette TenEyck. Not only did he fail to protect the Plaintiff's rights, but Judge Haines rewarded Antoinette TenEyck, on April 24, 1986, by awarding her more time with the children and curtailing substantially Raymond Auger's time and relationship with the children. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

10. Antoinette TenEyck harassed Raymond Auger by repeatedly asking for personal properties that she already had. On October 4, 1984, she filed for monies that she had already received on

September 12, 1983; and for personal properties that she already had. The hearing was continued to October 18, 1984. Antoinette TenEyck did not appear in court on that date. Raymond Auger was present in court with his lawyer and was responsible for lawyer's fees. This is in violation of the First, Fifth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

11. Antoinette TenEyck and Steven TenEyck constantly spied upon Raymond Auger during 1984 and 1985. Antoinette TenEyck admitted so in Judge Haines's courtroom. Judge Haines rewarded that behavior in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

12. During the custody trial, from December 1985 through April 1986, Antoinette TenEyck lied under oath no less than 67 times; Antoinette TenEyck misrepresented at least 19 other events and incidents. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

13. Steven TenEyck lied under oath no less than 17 times during the same trial, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

14. Judge Haines knowingly rewarded perjury by Antoinette TenEyck and Steven TenEyck, declaring on April 24, 1986, that "Credibility is not an issue..." This is in violation of the First, Fifth,

Eighth and Fourteenth Amendments of the Constitution of the U.S.

15. From May 1983 through April 1986, Antoinette TenEyck disobeyed court orders over 40 times. She used the children to harass the father and caused severe emotional distress to the Plaintiff. Judge Haines was made fully aware of the harassing tactics of Antoinette TenEyck and Steven TenEyck. Judge Haines rewarded the mother and punished the father. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

16. On June 22, 1986, Steven TenEyck assaulted and beat Raymond Auger while the latter was asking for his children. Antoinette TenEyck and Steven TenEyck

were clearly disobeying two court orders that morning. On June 23, Judge Haines refused to hear about it. This is in violation of the First, Fifth, Eighth, and Fourteenth Amendments of the Constitution of the U.S.

17. On April 24, 1986, Judge Haines reached a decision, strongly implied so in court, before Raymond Auger had been given any rebuttal time, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

18. On April 24, 1986, Judge Haines denied Raymond Auger proper rebuttal time in violation of the Fourteenth Amendment of the Constitution of the U.S.

19. Ten witnesses testified as to the competence of Raymond as a father. The witnesses described Raymond Auger as a "very good", "excellent", "the best father I have met..." Judge Haines labeled those witnesses as irrelevant. This is in violation of the Fifth, Eighth, and Fourteenth Amendments of the Constitution of the U.S.

20. On June 22, 1986, Antoinette TenEyck asked the court for an order that in effect denied Raymond Auger free access to his children, under false allegations. Judge Haines issued a discriminatory court order that is in violation of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

21. On June 14, 1986, Antoinette TenEyck refused to let Raymond Auger talk to his

son, in violation of the First, Fifth and Eighth Amendments of the Constitution of the U.S.

22. Antoinette TenEyck disobeyed, for three years, a court order to transfer her business interest to Raymond Auger. Judge Haines rewarded her for doing so. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

23. Antoinette TenEyck disobeyed, for three years, a court order to transfer her share of the marital home to Raymond Auger. Judge Haines rewarded her for doing so. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

24. On October 25, 1987, Antoinette TenEyck disobeyed a court order. Her lawyer, Kenneth S. Domzalski, sent a harassing letter dated November 5, 1987, to Raymond Auger. That letter and several others have caused the Plaintiff severe emotional distress. This is in violation of the First, Fifth and Eighth Amendments of the Constitution of the U.S.

25. Antoinette TenEyck violated the court order concerning the vacation notices in 1983, 1984 and 1985. Judge Haines allowed her to do so, violating the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

26. In November, 1984, Antoinette TenEyck and Steven TenEyck stole from

Raymond Auger the children's school pictures. Judge Haines rewarded them for doing so, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

27. During 1983, 1984, 1985 and 1986 Raymond Auger pleaded with Antoinette TenEyck for cooperation in the care and best interests of the children. Raymond Auger did so with letters, phone calls, directly or through third parties. Antoinette TenEyck constantly refused; she falsely accused Raymond Auger in court for lack of cooperation. Judge Haines rewarded her in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

28. On July 7, 1986, Antoinette TenEyck requested a Court Order to oblige Raymond Auger to attend family counseling sessions. Judge Haines granted that order, being fully aware that Antoinette TenEyck had consistently refused to deal directly or indirectly with Raymond Auger in matters regarding the children. Moreover, Raymond Auger was ordered to pay attorney's fees. This is in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

29. Antoinette TenEyck refused to deal with Raymond Auger with "honesty, fairness, and equality" at the onset of counselling sessions with Dr. Costello. Though she again refused cooperation, she later accused Raymond Auger of disobeying a Court Order. Again, she is using the

legal system to harass Raymond Auger. This is in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

30. Antoinette TenEyck constantly denies Raymond Auger his equal parental rights. This is in violation of the natural rights of the Plaintiff, in violation of the New Jersey laws, and in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

31. Steven TenEyck, with neither natural nor legal rights to the minor children, denied Raymond Auger his children on April 18, 1984, on June 24, 1984 and on June 22, 1986. This is in violation of the First, Fifth, Eighth and Fourteenth

Amendments of the Constitution of the U.S.

32. Raymond Auger had to request his lawyer's intervention to have his children on his birthday, on May 3, 1986. Antoinette TenEyck made false representations at the time. This is in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

33. Antoinette TenEyck denied Raymond Auger his children in April 1984, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

34. Antoinette TenEyck refused Raymond Auger his time with his children in May 1987, in violation of the First, Fifth,

Eighth and Fourteenth Amendments of the Constitution of the U.S.

35. In July 1987, Raymond Auger petitioned the court for protection of his time with his children. Judge Haines condoned the mother's cruelty and denied the Plaintiffs their time together, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

36. Antoinette TenEyck has, de facto, substituted Steven TenEyck as the children's father. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S. Antoinette TenEyck's actions amount to kidnapping, in violation of the Fifth Amendment of the Constitution of the U.S.

37. Steven TenEyck interferes with and intrudes upon, with the consent and encouragement of Antoinette TenEyck, the strictly parental rights of the father, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

38. On December 16, 1985, Judge Haines issued a temporary Court Order curtailing Raymond Auger's custody time with his children to punish the father for not being able to be in court on December 18, 23 and 24. At that time, Judge Haines had not heard a single word of testimony from the father, Raymond Auger. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments.

39. In January 1986, Judge Haines accommodated Antoinette TenEyck and

Steven TenEyck for not being available for court during the week of January 2, 1986 (They were going to Cancun!) (Raymond Auger had to work at the risk of bankruptcy.) This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

40. Dr. Janet Berson, the court-appointed psychologist, refused to hear fully and at length the father Raymond Auger. This is in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

41. Dr. Janet Berson wrote her report to the court with less than 5% knowledge of the facts, events, incidents, or attitudes she was appointed to

investigate, in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

42. Dr. Janet Berson interviewed Steven TenEyck, the mother's main and only witness, but refused to interview the father's many witnesses. This is in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

43. Dr. Janet Berson was made fully aware of Antoinette TenEyck's refusal to share equal custody, in her office on May 8, 1985. Her subsequent actions are in violation of the Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

44. Dr. Janet Berson admitted to Raymond Auger, on December 13, 1985, in her Moorestown office, that Raymond Auger's "side was not given enough consideration." However, she proceeded to deny Raymond Auger equal rights in violation of the Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

45. Dr. Janet Berson refused the request of Raymond Auger to correct three gross errors in her report to the court. Her report and her testimony are in violation of the Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

46. In July 1985, Raymond Auger requested protection of his constitutional rights by applying to the

court for a court-approved psychologist. Judge Ferrelli penalized Raymond Auger with attorney's fees, in violation of the Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

47. In December 1986, Raymond Auger requested a Court Order to ban Steven TenEyck from interfering in parental matters. Not only did Judge Haines refuse to protect constitutional rights, but he condoned the violation of those parental rights by Steven TenEyck. Raymond Auger was charged with attorney's fees. This is in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

48. In December 1986, Judge Haines stripped Raymond Auger of his rights to make parental decisions in the best interests of his children, in violation of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

49. Kenneth S. Domzalski lied in the courtroom during the custody trial. He lied in the courtroom in December 1986. He made defamatory remarks against Raymond Auger, in violation of the First, Eighth and Fourteenth Amendments of the Constitution of the U.S.

50. Kenneth S. Domzalski lied in the courtroom during several court hearings between February 3, 1984, and April 28, 1989, in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth

Amendments of the Constitution of the U.S.

51. Judge Ferrelli had convincing evidence of the perjured testimony of Kenneth S. Domzalski during that period. Judge Ferrelli rewarded Kenneth S. Domzalski and his client with attorney's fees, in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

52. Antoinette TenEyck made false accusations to the court from February 2, 1989, through the present. Judge Ferrelli had convincing evidence of perjury. Judge Ferrelli rewarded Antoinette TenEyck and punished Raymond Auger, the father, in violation of the First, Fifth, Eighth, Thirteenth and

Fourteenth Amendments of the Constitution of the U.S.

53. Kenneth S. Domzalski threatened Raymond Auger with jail on March 10, 1989. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

54. Kenneth S. Domzalski constantly harassed Raymond Auger and violated his parental rights from November 1984 through June 1989, in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

55. Judge Ferrelli has ordered Raymond Auger to abdicate his parental rights to make decisions for his children from February 3, 1989 through May 1989, in

violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

56. Judge Ferrelli has ordered Raymond Auger to pay attorney's fees while denying Raymond Auger his equal rights to parenting; and for Raymond Auger's refusal to abdicate his parental rights. Judge Ferrelli's actions are in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

57. Antoinette TenEyck has not only repeatedly denied Raymond Auger his equal parental rights, but has applied to the court for denial of those rights, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

58. In December 1987, Judge Tunney was presented with overwhelming evidence of violation of the civil rights of Raymond Auger and his children. Judge Tunney rejected Raymond Auger's request for reconsideration of the Court Order. Raymond Auger was penalized by Judge Tunney for requesting protection of his civil rights. Morever, we have evidence of collusion between Judge Haines and Judge Tunney to deny Raymond Auger his constitutional rights. This is in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

59. Dr. Julian Freeman made an appointment to see the minor Plaintiffs on April 6, 1989, against the written objections of the Plaintiff father, thereby violating the parental rights of

Raymond Auger. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

60. On March 18, 1989, Judge Ferrelli dismissed complaints filed against Defendants Antoinette TenEcyk, Steven TenEyck, Kenneth S. Domzalski and Janet S. Berson by Raymond Auger. These complaints were for violations of the Plaintiff's civil rights by the Defendants. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

61. On June 21, 1988, Judges King and d'Annunzio of the Appellate Court of New Jersey denied the Plaintiff their natural and constitutional rights by dismissing

complaints against the Defendants Antoinette TenEyck, Steven TenEyck, Kenneth S. Domzalski, and Janet S. Berson, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

62. On August 15, 1989, Judges Brody and Muir dismissed a motion filed by the Plaintiff in the same matter. This is in violation of the civil rights of the Plaintiff and a denial of justice, a constitutional violation.

63. In January and February 1989, Kenneth S. Domzalski attempted to choose his own judge, in violation of basic rules of judicial ethics.

64. On April 13, 1989, Kenneth S. Domzalski requested the Court to hear a

motion on April 21, 1989, in violation of New Jersey Court Rule 1:6-3. Judge Ferrelli heard the motion, in violation of the same rule.

65. On April 28, 1989, Kenneth S. Domzalski and the Court of New Jersey (Judge Ferrelli) were in violation of the three New Jersey Court rules (Rule 1:6-3; Rule 2:9-1; Rule 4:5-1) and of the civil rights of the Plaintiffs.

66. On April 13, 1989, Kenneth S. Domzalski filed a motion for sole custody on behalf of Antoinette TenEyck, in violation of the natural rights of the Plaintiff; in violation of the New Jersey Court Rule 2:9-1; in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

67. On April 3, 1989, New Jersey Rule 1:6-3 was violated when Judge Ferrelli, at the instigation of Kenneth S. Domzalski and Antoinette TenEyck, heard a Notice of Motion scheduled for April 14, 1989.

68. Between February 3, 1989, and May 22, 1989, Raymond Auger was penalized $1972.00 for: a) requesting the Court to protect his constitutional rights, and b) refusing to abdicate his parental rights. This is in violation of the First, Fifth, Eighth, Thirteenth and Fourteenth Amendments of the Constitution of the U.S.

69. On February 3, 1989, Plaintiff Raymond Auger was denied an order by Judge Myron Gottlieb to ban Kenneth S. Domzalski from harassing Raymond Auger,

in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

70. In March 1989, Judge Ferrelli denied Plaintiff Raymond Auger a stay order, which was in violation of the basic natural and legal rights of the Plaintiff. This denial is in violation of the Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

71. On April 17, 1989, Judges King, Brody and Ashbey denied a stay of order, which was unconstitutional, thereby denying the Plaintiffs their civil rights in violation of the Fifth and Fourteenth Amendments of the Constitution of the U.S.

72. On April 24, 1989, Justice Robert Wilentz denied Plaintiff Raymond Auger a stay of an order, which was in violation of the Fifth and Fourteenth Amendments of the Constitution of the U.S.

73. In June 1989, Kenneth S. Domzalski, on behalf of Antoinette TenEyck, filed for sole custody and other matters, in violation of the natural and civil rights of the Plaintiff. This is in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

74. In June 1989, Kenneth S. Domzalski, on behalf of Antoinette TenEyck, filed a motion attempting to deny the Plaintiff's freedom of speech, a violation of the Plaintiff's civil rights and of the First Amendment of the Constitution of the U.S.

75. On June 29, 1989, Kenneth S. Domzalski requested a court hearing on July 7, 1989, a violation of New Jersey Court Rule 1:6-3.

76. On February 3, 1989, Plaintiff Raymond Auger was refused attorney's fees, in violation of Orr v. Orr (1979), and in violation of the Ninth and Fourteenth Amendments of the Constitution of the U.S.

77. On June 2, 1989, Judges Coleman and d'Annunzio denied the Plaintiff their natural and legal rights to a parent-child relationship equal to that of the mother, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

78. All persons named herein, including attorneys Guest, Watson and Snyder contributed to the denial and/or obstruction of justice to the Plaintiffs, in violation of the First, Fifth, Eighth and Fourteenth Amendments of the Constitution of the U.S.

5. CONCLUSION

This case involves substantial Federal questions presented throughout this complaint. The actions of the Defendants, described above, constitute conspiracy to deny due process of law and the equal protection of the law; fraud, extortion, perjury and subornation of perjury, alienation of affection of Plaintiff Daniel-Marc Auger and Chantal-Marise Auger the intentional infliction of emotional distress, cruelty and

slander of character of Plaintiff Raymond Auger. The actions of the Defendants have caused the illegal and unconstitutional violations of the parent-child relationships between Plaintiff Raymond Auger and Plaintiffs Daniel-Marc Auger and Chantal-Marise Auger, inflicting great mental and physical pain and anguish to the Plaintiffs.

Further, the adult Plaintiff has been required to expend great sums of money (over $30,000) and to expend time and effort taken from his regular business pursuits (loss of over 14 months, since 1984), to seek and obtain material advice and treatment, legal advice and assistance, to prepare court documents, for lawyers and/or legal counsel, or to represent himself as Pro

Se in court proceedings, losing over 2500 hours of regular sleep during those years, all to cause great physical and/or emotional harm to the Plaintiffs Daniel-Marc Auger and Chantal-Marise Auger and Raymond Auger, to the sum stated below.

WHEREFORE PLAINTIFFS DEMAND

A. Judgment against the New Jersey Judges named above as municipal judge, Superior Court Judges, Appellate Court Judges, Supreme Court Judge, for injunctive relief and for filing costs;

B. Judgement against Defendants Antoinette TenEyck and Steven TenEyck, jointly and severally, in punitive and compensatory damages in the amount of $1,500,000 for Plaintiffs Daniel-Marc Auger, Chantal-Marise Auger and Raymond

Auger; Judgement against Defendant Janet Berson, for punitive and compensatory damages in the amount of $1,900,000 for Daniel-Marc Auger, Chantal-Marise Auger, and Raymond Auger; Judgement against Defendant Julian Freeman in punitive and compensatory damages in the amount of $10,000 for Plaintiff Raymond Auger; Judgement against Kenneth S. Domzalski, individually and as an employee of the firm Bookbinder, Guest and Domzalski, jointly and severally, in punitive and compensatory damages in the amount of $950,000 for Plaintiffs Daniel-Marc Auger, Chantal-Marise Auger and Raymond Auger; Judgement against against Brian Guest, Lu-Ann Watson and Paul Snyder, individually and as employees of the firm Bookbinder, Guest and Domzalski and the firm Marshall, Dennebey, Warner, Coleman and Goggins, jointly and severally, in

the amount of $700,000 for Plaintiffs Daniel-Marc Auger, Chantal-Marise Auger and Raymond Auger;

C. Preliminary and permanent injunctions against the Defendants and their agents, successors, employees, and associates, restraining the Defendants from further harassment, intimidation, and persecution of the Plaintiffs or denial of their constitutional rights, privileges and immunities;

D. That this Court order the restraining order that presently exists from case docket # FM-20-404-81 be set aside and declared null and void, for unconstitutionally curtailing the parental rights of Plaintiff Raymond Auger and discriminating against the same Plaintiff without compelling evidence;

requiring that equal custody of Daniel-Marc Auger and Chantal-Marise Auger be granted to both Plaintiff Raymond Auger and Defendant Antoinette TenEyck so that physical possession of the Plaintiffs Daniel-Marc Auger and Chantal-Marise Auger be held by both Raymond Auger and Antoinette TenEyck; so that Daniel-Marc Auger and Chantal-Marise Auger can enjoy and benefit from the love, care, affection and management of both parents equally;

E. That this Court order the exclusive rights of parental decisions to Raymond Auger and Antoinette TenEyck, thereby barring Defendant Steven TenEyck from parental decisions concerning the children's welfare, education, and medical care;

F. That all Court orders obtained during the course of past litigation be null and void because obtained as a result of violations of the constitutional rights of the Plaintiffs; that all attorney's fees, either incurred, paid or pending by Plaintiff Raymond Auger be refunded by Antoinette TenEyck and Steven TenEyck to Plaintiff Raymond Auger; that all attorney's fees ordered by the New Jersey judges be set aside and declared null and void;

G. That the Plaintiff Raymond Auger receive from the Defendants their cost and disbursement in this action;

H. That the Plaintiff Raymond Auger be awarded reasonable attorney's fees or a sum in lieu of attorney's fees; and

I. That the Court make any further orders that may appear just in the circumstances.

By the Plaintiffs, Pro Se

Raymond Auger
Raymond Auger, individually and
for Daniel-Marc and Chantal-Marise Auger,
minors, as father, next friend, and
natural guardian
10 Bretton Way
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No. 90-1624

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DANIEL-MARC AUGER, CHANTAL-MARISE AUGER, all minors, by their father, next friend and natural guardian, RAYMOND AUGER,

Petitioners,

vs.

ANTOINETTE TENEYCK, individually; STEVEN TENEYCK, individually; DR. JANET BERSON, individually; KENNETH S. DOMZALSKI, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski; BRIAN GUEST, individually and as an employee of the law firm of Bookbinder,

(Continued)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DR. JANET BERSON

THOMAS D. FLINN
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Guest and Domzalski; LU-ANN WATSON and PAUL SNYDER, individually and as employees of the law firm of Marshall, Dennebey, Warner, Coleman and Goggin; DR. JULIAN FREEMAN, individually; JUDGE JAMES A. YOCUM, Municipal Court Judge of Moorestown, New Jersey; JUDGE CORNELIUS SULLIVAN, JUDGE MARTIN HAINES, JUDGE ANTHONY TUNNEY, JUDGE DOMINICK FERRELLI, JUDGE MYRON GOTTLIEB, JUDGE VICTOR FRIEDMAN, Individually and as Superior Court Judges of New Jersey; JUDGE MICHAEL KING, JUDGE WARREN BRODY, JUDGE JULIO ASHBEY, JUDGE JAMES H. COLEMAN, JUDGE WILLIAM M. D'ANNUNZIO, JUDGE ROBERT MUIR, individually and as judges of New Jersey Appellate Court; CHIEF JUSTICE ROBERT WILENTZ, individually and as Judge of the Supreme Court of New Jersey,

Respondents.

QUESTIONS PRESENTED

1. Is the petition for writ of certiorari procedurally correct as to respondent Dr. Berson?

2. If petitioner's writ is procedurally correct, then is the Third Circuit's affirmance of the district court opinion reversible error?

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No. 90-1624

In The

Supreme Court of the United States

October Term, 1991

DANIEL-MARC AUGER, *et al.*,

Petitioners,

vs.

ANTOINETTE TENEYCK, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DR. JANET BERSON

OPINIONS BELOW

1. Opinion of the United States Court of Appeals for the Third Circuit (unpublished), rendered November 26, 1990. (*See* Appendix A to Petition for Writ of Certiorari.)

2. Opinion of the United States District Court for the District of New Jersey by the Honorable John C. Lifland, U.S.D.J. (unpublished), rendered April 6, 1990. (*See* Appendix B to Petition for Writ of Certiorari.)

3. Opinion of the United States District Court for the District of New Jersey by the Honorable John C. Lifland, U.S.D.J. (unpublished), rendered June 28, 1990. (*See* Appendix A to Respondent's Brief in Opposition, *infra* at 1ra.)

STATEMENT OF JURISDICTION

The issue of jurisdiction as to this petition is discussed in Point I, *infra*, and the Court is respectfully directed to respondent's argument therein.

COUNTER-STATEMENT OF THE CASE

Petitioner Raymond Auger's complaint, alleging violation of his civil rights and proporting to set forth a cause of action under 42 U.S.C. § 1983; 42 U.S.C. § 1985; and 42 U.S.C. § 1986, was filed on July 17, 1989. Subsequent thereto, an amendment was filed on July 27, 1989. The complaint's genesis is found in a matrimonial dispute between petitioner and his former wife Antoinette Teneyck which occurred in 1982. The dispute was the subject of numerous proceedings in the state courts of the State of New Jersey: in particular, the Superior Court of New Jersey, Chancery and Law Divisions; the Superior Court of New Jersey, Appellate Division; and the Supreme Court of the State of New Jersey. According to the record below all state court proceedings were decided adversely to petitioner Auger, evidently prompting his decision to seek recourse in the United States District Court for the District of New Jersey.

In the United States District Court for the District of New

Jersey, the petitioners sought redress against 22 defendants, including the following:

> Antoinette Teneyck, his former wife; Steven Teneyck, his former wife's new husband; Kenneth Domzalski and Brian Guest, attorneys for the Teneycks; Paul Schneider and Lu Ann Watson; counsel for Dr. Berson in the state court proceedings; Dr. Julian Freeman, an orthodontist; the Honorable James Yocum, a municipal court judge; 13 members of the New Jersey state judiciary, including the Chief Justice; and this respondent, Dr. Janet Berson, a court-appointed psychologist called upon to render an opinion as to petitioner's status as a parent.

The theories as to all defendants relate to their participation in the state court proceedings, *i.e.*, that their participation in these proceedings violated his civil rights.

By way of procedural history, Dr. Janet Berson was served with petitioners' complaint on August 19, 1989. Due to the fact that her prior counsel was named in the federal court lawsuit, an obvious conflict of interest was created. She was forced to seek new counsel and referred the matter to her insurance carrier. After thorough review, the carrier assigned the file to Dr. Berson's present counsel. The forgoing process took approximately 45 days. During this 45-day span, the petitioner Raymond Auger filed his notice of motion for default and default judgment. Dr. Berson cross-motioned to file a responsive pleading out of time. In the interim, other defendants filed motions to dismiss the complaint against them for failure to state a claim.

All pending motions came before the United States District Court on April 9, 1990, when the Honorable John C. Lifland, U.S.D.J. entered a memorandum and order dismissing the complaint as to all the defendants who had sought such relief.

As to the remaining defendant, Dr. Berson, he allowed the filing of a responsive pleading by April 15, 1990. He also denied the petitioner's motion to enter default judgment. A copy of that opinion is attached as Appendix B-1 to the petition for writ of certiorari.

Dissatisfied with the disposition by the district court, petitioner filed a notice of motion for leave to appeal the order of Judge Lifland on May 7, 1990. (*See* respondent's appendix at 4ra.)[1] Subsequent to the filing of petitioner's notice of motion for leave to appeal, respondent Berson filed her notice of motion for summary judgment. The motion was returnable on June 18, 1990. On June 29, 1990, after considering opposition filed by the petitioner, Judge Lifland granted respondent's motion and dismissed petitioner's cause of action. That decision is detailed in a separate memorandum and order of June 28, 1990 and is appended to this respondent's brief in opposition since it was omitted from petitioner's brief and appendix. To date, no notice of appeal of that order has been filed.

It is the position of this respondent that the within petition is procedurally improper. While petitioner attacks the substantive dismissal of the complaint against Dr. Janet Berson, no appeal as to that issue was ever taken. The order from which petitioner sought leave to appeal was the *first* memorandum and order of Judge Lifland. While petitioner may have wanted to appeal the decision granting summary judgment to Dr. Berson, for whatever reason, he chose not to do so.

The order from which petitioner actually filed notice for leave

---

1. Petitioner's notice for leave to appeal was originally directed to the United States Supreme Court, however it was accepted and filed by the clerk of the United States Court of Appeals for the Third Circuit in spite of its procedural deficiency.

to appeal is the order which entered summary judgment as to other defendants. However, this order only allowed the filing of a responsive pleading out of time as to this respondent. Thus, any appeal of this issue would necessarily be interlocutory.

Interlocutory appeals require written certification of the interlocutory question by the trial judge in the memorandum and order. As is evidenced by 28 U.S.C. § 1292(b), discussed in Point I, *infra*, this certification is a prerequisite for appellate jurisdiction. No such certification was ever given in this case.

On November 26, 1990, the United States Court of Appeals for the Third Circuit issued its decision affirming the United States District Court for the District of New Jersey. A petition for rehearing *en banc* was denied by the United States Court of Appeals for the Third Circuit on January 25, 1991. Whereupon, Raymond Auger, through his present counsel, filed his petition for a writ of certiorari to this judicial body.

For the reasons discussed hereafter, respondent Dr. Janet Berson most respectfully submits that the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS PROCEDURALLY DEFICIENT AS TO RESPONDENT DR. JANET BERSON AND SHOULD BE DENIED.

Petitioner invokes the jurisdiction of this Court in reliance upon 28 U.S.C. § 1254(1). This statute provides as follows:

> § 1254. Courts of appeals; certiorari, certified questions.
>
> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Petitions for writ of certiorari are governed by United States Supreme Court Rule 10, which provides as follows:

> Rule 10. Considerations Governing Review on Writ of Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

As will be demonstrated, the within petition fails to pass muster under the above statute and rule and accordingly should be denied.

In order to more fully understand the chronology of events in this case a simple chart is illustrative:

A. July 17, 1989,
Plaintiff filed pro se complaint.

B. July 27, 1989,
Plaintiff filed amendment to pro se complaint.

C. September 29, 1989,
Plaintiff filed motion for default and default judgment returnable, November 6, 1989.

D. October 20, 1989,
Respondent Dr. Janet Berson filed a motion to file answer out of time.

E. November, 1989,
Defendants filed various motions to dismiss.

F. Honorable John C. Lifland, U.S.D.J. issued first opinion granting summary judgment as to remaining defendants and allowing respondent Berson to file answer by April 16, 1990.

G. April 16, 1990,
Respondent Berson complied with order and filed answer.

H. May 7, 1990,
Plaintiff filed notice for leave to appeal to United

States Court of Appeals for Third Circuit as to April 6 order of Honorable John C. Lifland.

I. May 22, 1990,
Respondent Berson moved for summary judgment as to the plaintiff's complaint against her.

J. June 26, 1990,
Honorable John C. Lifland, U.S.D.J. entered second order granting summary judgment as to respondent Berson (*see* respondent's appendix at 1ra-3ra).

As is plainly evident from the above list, petitioner's notice for leave to appeal was filed on May 7, 1990: more than 2 weeks prior to the date when this respondent moved for summary judgment in the United States District Court for the District of New Jersey. As petitioner's notice for leave to appeal illustrates, petitioner sought review of the April 6, 1990 district court opinion of the Honorable John C. Lifland, U.S.D.J. (*see* respondent's appendix at 4ra-5ra). Thus, the only potentially appealable issue as to this respondent would have been whether the district court erred in allowing respondent to file her answer out of time. It is this precise question as to Dr. Berson that was before the United States Court of Appeals, and, it is this same question that is before this Court now.

It appears that this Court lacks jurisdiction to determine this case as to Dr. Janet Berson. Since the April 8th memorandum and order of Judge Lifland did not resolve all issues as to all parties, the appeal must be deemed to be interlocutory. Interlocutory appeals are governed by 28 U.S.C. § 1292 which provides as follows:

§ 1292. Interlocutory decisions

> (a) Except as provided in subsection (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court; . . . .
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Paragraph (b) of the above rule clearly indicates that a trial judge must certify the question before an interlocutory appeal is allowed. Numerous opinions also hold that without such certification there is no appellate jurisdiction. *See e.g., Barfield*

v. Weinberger, 485 F.2d 696 (5th Cir. 1973). In the present case, the trial judge did not certify any interlocutory question, therefore no appellate review is available as to respondent.[2] Petitioner fails to address the issue above and instead turns directly to an examination of the allegations against Dr. Berson. This practice is erroneous under the cited law and mandates a denial of the petition.

In summary, the petition for certiorari should be denied because the order of final judgment as to Dr. Berson was never properly appealed and because the order from which petitioner has appealed is an uncertified interlocutory order for which there exists no appellate jurisdiction.

II.

THE PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED ON SUBSTANTIVE GROUNDS AS WELL.

Even if this Court were to address petitioner's argument on a substantive basis, the petition should be denied. The crux of petitioner's argument is that the district court failed to give proper treatment to the *pro se* complaint. In particular, petitioner suggests that the district court failed to consider the conspiracy argument under 42 U.S.C. § 1985 and 42 U.S.C. § 1986. A review of the opinions below shows that this is patently untrue.

When looking at petitioner's complaint as to this respondent, the Court will find only three (3) allegations. These allegations are set forth at page 14 of the petition for writ of certiorari and need not be repeated. Suffice to say that the "allegations" are

---

2. While the subsequent dismissal of the case as to Dr. Berson may have rendered moot the question of interlocutory appeal as to other respondents, no appeal was ever filed as to the substantive dismissal of Dr. Berson.

mere conclusory statements which fail to show a cause of action under 42 U.S.C. § 1983, § 1985 or § 1986.

The district court correctly held, and the Third Circuit correctly affirmed, the determination of no cause of action as to respondent. The opinion of the Honorable John C. Lifland, U.S.D.J. indulgently characterized petitioner's complaint under 42 U.S.C. § 1983. In fact, it can hardly be said petitioner's complaint sets forth a cause of action at all. Therefore, the district court's treatment of the complaint was more than just.

Upon evaluating respondent's motion for summary judgment, the court opined that respondent Berson was not a "state actor" for the purpose of 42 U.S.C. § 1983. The court correctly cited to the prior decisions in *Hall v. Quillen*, 63 F.2d 1154 (4th Cir. 1980) and *Andersen v. Glisman*, 577 F. Supp. 1506 (D. Col. 1984). In addition, the court also found that petitioner produced no evidence to substantiate an inference that any court official influenced Dr. Berson. Most importantly, the court also found that there was "*no allegation that Dr. Berson conspired with any state actor to violate plaintiff's civil rights*" (emphasis added) (*see* respondent's appendix at 3ra). A plain reading of the last paragraph of the June 28, 1990 opinion of the district court reveals the thorough consideration given below to petitioner's complaint.

While petitioner argues that the district court failed to consider all allegations of the petitioner's *pro se* complaint, it is, however, obvious that the district court clearly gave all favorable inferences to the petitioner.

It is respectfully submitted that the decision of the United States District Court for the District of New Jersey dismissing the complaint as to Dr. Janet Berson was proper and appropriate. Even under the liberal construction of pleadings under Federal Rule of Civil Procedure 8(b), the petitioner's complaint failed

to pass muster. Moreover, the United States Court of Appeals for the Third Circuit Court appropriately affirmed the decision. Hence, the petition for writ of certiorari should be denied.

CONCLUSION

For the forgoing reasons it is respectfully submitted that the petition for writ of certiorari is procedurally improper and substantively unsupported by the facts. Therefore, respondent, Dr. Janet Berson, respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

THOMAS D. FLINN
Counsel of Record
GARRITY, FITZPATRICK,
GRAHAM, HAWKINS &
FAVETTA, P.C.
Attorneys for Respondent
Dr. Janet Berson

APPENDIX A — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JUNE 28, 1990

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO.: 89-3982 (JCL)

DANIEL-MARC AUGER, ET AL.,

PLAINTIFFS,

v.

ANTOINETTE TENEYCK, ET AL.,

DEFENDANTS.

MEMORANDUM AND ORDER

LIFLAND, District Judge

Raymond Auger brings this *pro se* civil rights action individually and on behalf of his two minor children. At the heart of the action is a matrimonial dispute between Raymond Auger and his former wife Antoinette Teneynk. Presently before the court is defendant Dr. Janet Berson's motion for summary judgment. After review of the papers submitted pursuant to *Fed. R. Civ. P.* 78, the court grants the motion for the following reasons.

The facts underlying this litigation are detailed in the court's

Appendix A

Order filed April 6, 1990. That order dismissed the action as to all defendants except Dr. Berson.

Plaintiffs have asserted a cause of action under 42 U.S.C. § 1983 against Dr. Berson on the grounds that their constitutional rights were violated because Dr. Berson's custody evaluation was biased in favor of Antoinette Teneynk. The complaint alleges that Dr. Berson "refused to hear fully and at length the father Raymond Auger," Complaint at ¶ 40; that Dr. Berson "wrote her report to the court with less than 5% knowledge of the facts, events, incidents, or attitudes she was appointed to investigate," Complaint at ¶ 41; that Dr. Berson "refused to interview the father's many witnesses," Complaint at ¶ 42; that Dr. Berson made her recommendation despite her awareness of Antoinette Teneyck's refusal to share custody of the children, Complaint at ¶ 43; that Dr. Berson admitted to Raymond Auger that his side was not given enough consideration, Complaint at ¶ 44; and that Dr. Berson "refused the request of Raymond Auger to correct three gross errors in her report to the court," Complaint at ¶ 45.

Dr. Berson moves for summary judgment on the ground that a court-appointed physician is not a state actor within the meaning of 42 U.S.C. § 1983.[1] The relevant inquiry is whether Dr. Berson's actions can be fairly attributed to the state. A determination whether there is sufficient state action must be made by weighing

---

1. In the alternative, Dr. Berson contends that plaintiffs' cause of action is precluded by the statute of limitations. The applicable statute of limitations in this case is the New Jersey Personal Injury Statute, which is two years. *See Wilson v. Garcia*, 471 U.S. 261 (1985); N.J.S.A. 2A:14-2. Dr. Berson has not indicated by way of affidavit or other proof the date of termination of her relationship with plaintiffs. Accordingly, Dr. Berson's motion for summary judgment on the statute of limitations ground is denied.

the particular circumstances of each case.

Dr. Berson was appointed by the state trial court to recommend who should have custody of the minor children. It is undisputed that her evaluation was performed under the authority of the court. However, the mere fact that a private party's actions were performed pursuant to court appointment does not make those actions fairly attributable to the state. *See Thomas v. Howard*, 455 F.2d 228 (3d Cir. 1972) (court-appointed attorney is not a state actor); *Hall v. Quillen*, 631 F.2d 1154 (4th Cir. 1980) (court-appointed physician is not a state actor); Anderson v. Glismann, 577 F.Supp. 1506 (D. Col. 1984) (court-appointed psychiatrist is not a state actor). Plaintiffs have produced no evidence supporting an inference that the state court judge or any other court official influenced Dr. Berson's decision. In addition, there is no allegation that Dr. Berson conspired with state actors to violate plaintiffs' constitutional rights.

Accordingly,

IT IS on this 28th day of June, 1990 ORDERED that Dr. Berson's motion for summary judgment is granted.

s/ John C. Lifland
JOHN C. LIFLAND
United States District Judge

APPENDIX B — NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT FILED MAY 7, 1990

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

File No. 8903082 (JCL) Civil Action

DANIEL-MARC AUGER, CHANTAL-MARISE AUGER, all minors, by their father, next friend and natural guardian, RAYMOND AUGER,

Plaintiffs

vs

ANTOINETTE TENEYCK, individually; STEVEN TENNEYCK, individually; DR. JANET BERSON, individually; KENNETH S. DOMZALSKI, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski; BRIAN GUEST, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski; LU-ANN WATSON and PAUL SNYDER, individually and as an employees of the law firm of Marshall, Dennebey, Warner, Coleman and Goggin; DR. JULIAN FREEMAN, individually; JUDGE JAMES A. YOCUM, Municipal court judge of Moorestown, New Jersey; JUDGE CORNELIUS SULLIVAN, JUDGE MARTIN HAINES, JUDGE ANTHONY TUNNEY, JUDGE DOMINICK FERRELLI, JUDGE MYRON GOTTLIEB, JUDGE VICTOR FRIEDMAN, Individually as as Superior Court Judges of New Jersey; JUDGE MICHAEL KING, JUDGE WARREN BRODY, JUDGE JULIO ASHBEY, JUDGE JAMES H. COLEMAN, JUDGE WILLIAM M. D'ANNUNZIO, JUDGE ROBERT MUIR, individually and as judges of New Jersey Appellate Court; CHIEF JUSTICE ROBERT WILENTZ, individually and as Judge of the Supreme Court of New Jersey,

Defendants

Appendix B

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs above named Raymond Auger, Daniel-Marc Auger and Chantal-Marise Auger, hereby appeal to the United States Supreme Court from a final judgment, opinion. From the order describing it, Civil Action No. 89-3082 (JCL). Raymond Auger's cause of action be and the same is hereby dismissed; and that the Plaintiffs' motion is hereby denied, Entered in this action, April 6, 1990.

Violations of the Plaintiffs' first Amendment rights to peace and privacy in the parent-child relationship; Violations of the Plaintiffs' fifth Amendment of property rights to a parent-child relationship; Violations of the Plaintiffs' Eighth Amendment by cruel and unusual punishment; Violations of his Thirteenth Amendment by involuntary servitude (fees ordered and denied); Violation of his fourteenth Amendment right to due process and equal protection under the law; Violation of Seventh Amendment right to a jury trial for civil rights violations; Judge's conflict of interest; Intentional Infliction of cruelty and Emotional Distress; Violations of freedom of speech rights and systematic denial of justice and physical intimidation by Judge Ferrelli to deny and attempt to deny due process and justice by the judiciary and associates. Title 42 U.S.C. 1983, 1985 or 1986.

s/ Raymond Auger
RAYMOND AUGER, PRO SE
10 Bretton Way
Mount Laurel, New Jersey 08054

May 5, 1990

No. 90-1624

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DANIEL-MARC AUGER, CHANTAL-MARISE AUGER, all minors, by their father, next friend and natural guardian, RAYMOND AUGER,

Petitioners,

vs.

ANTOINETTE TENEYCK, individually; STEVEN TENEYCK, individually; DR. JANET BERSON, individually; KENNETH S. DOMZALSKI, individually and as an employee of the law firm of Bookbinder, Guest and Domzalski; BRIAN GUEST, individually and as an employee of the law firm of Bookbinder,

(Continued)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ANTOINETTE TENEYCK, STEVEN TENEYCK, KENNETH S. DOMZALSKI AND BRIAN GUEST

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Guest and Domzalski; LU-ANN WATSON and PAUL SNYDER, individually and as employees of the law firm of Marshall, Dennebey, Warner, Coleman and Goggin; DR. JULIAN FREEMAN, individually; JUDGE JAMES A. YOCUM, Municipal Court Judge of Moorestown, New Jersey; JUDGE CORNELIUS SULLIVAN, JUDGE MARTIN HAINES, JUDGE ANTHONY TUNNEY, JUDGE DOMINICK FERRELLI, JUDGE MYRON GOTTLIEB, JUDGE VICTOR FRIEDMAN, Individually and as Superior Court Judges of New Jersey; JUDGE MICHAEL KING, JUDGE WARREN BRODY, JUDGE JULIO ASHBEY, JUDGE JAMES H. COLEMAN, JUDGE WILLIAM M. D'ANNUNZIO, JUDGE ROBERT MUIR, individually and as judges of New Jersey Appellate Court; CHIEF JUSTICE ROBERT WILENTZ, individually and as Judge of the Supreme Court of New Jersey,

Respondents.

QUESTIONS PRESENTED

1. Is the petition for writ of certiorari procedurally correct as to respondents, Antoinette TenEyck, Steven TenEyck, Kenneth S. Domzalski and Brian Guest?

2. If petitioner's writ is procedurally correct, then is the Third Circuit's affirmance of the district court opinion reversible error?

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No. 90-1624

In The

Supreme Court of the United States

October Term, 1991

DANIEL-MARC AUGER, *et al.*,

Petitioners,

vs.

ANTIONETTE TENEYCK, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ANTOINETTE TENEYCK, STEVEN TENEYCK, KENNETH S. DOMZALSKI AND BRIAN GUEST

OPINIONS BELOW

1. Opinion of the United States Court of Appeals for the Third Circuit (unpublished), rendered November 26, 1990. (*See* Appendix A to Petition for Writ of Certiorari.)

2. Opinion of the United States District Court for the District of New Jersey by the Honorable John C. Lifland, U.S.C.J. (unpublished), rendered April 6, 1990. (*See* Appendix B to Petition for Writ of Certiorari.)

3. Opinion of the United States District Court for the District of New Jersey by the Honorable John C. Lifland, U.S.C.J. (unpublished), rendered June 28, 1990. (*See* Appendix A to Brief in Opposition of Respondent, Dr. Janet Berson, at 1ra.)

STATEMENT OF JURISDICTION

The issue of jurisdiction as to this petition is discussed in Point I, *infra*, and the Court is respectfully directed to respondent's argument therein.

COUNTER-STATEMENT OF THE CASE

Petitioner Raymond Auger's complaint, alleging violation of his civil rights and purporting to set forth a cause of action under 42 U.S.C. § 1983; 42 U.S.C. § 1985; and 42 U.S.C. § 1986, was filed on July 17, 1989. Subsequent thereto, an amendment was filed on July 27, 1989. The complaint's genesis is found in a matrimonial dispute between petitioner and his former wife Antoinette TenEyck which occurred in 1982. The dispute was the subject of numerous proceedings in the State of New Jersey: in particular, the Superior Court of New Jersey, Chancery and Law Division; the Superior Court of New Jersey, Appellate Division; and the Supreme Court of the State of New Jersey. According to the record below all state court proceedings were decided adversely to petitioner, Auger, evidently prompting his decision to seek recourse in the United States District Court for the District of New Jersey.

In the United States District Court for the District of New Jersey, the petitioner sought redress against 22 defendants, including the following:

> Antoinette TenEyck, his former wife; Steven TenEyck, his former wife's new husband; Kenneth S. Domzalski and Brian Guest, attorneys for the TenEycks; Paul Snyder and Lu-Ann Watson; counsel for Dr. Berson in the state court proceedings; Dr. Julian Freeman, an orthodontist; the Honorable James Yocum, a municipal court judge; 13 members of the New Jersey state judiciary, including the Chief Justice; and, Dr. Janet Berson, a court appointed psychologist.

The theories as to all defendants relate to their participation in the state court proceedings, *i.e.* that their participation in these proceedings violated his civil rights.

By way of procedural history, during the initial 45-days following the filing and service of the complaint in the district court, various motions were filed including: 1) a motion by the petitioner, Raymond Auger, for default and default judgment; 2) a motion by Dr. Berson to file a responsive pleading out of time; 3) and motions by other defendants to dismiss the complaint against them for failure to state a claim for relief.

All pending motions came before the United States District Court on April 6, 1990, when the Honorable John C. Lifland, U.S.C.J. entered a memorandum and order dismissing the complaint as to all the defendants who have sought such relief. As to the remaining defendant, Dr. Berson, Judge Lifland allowed the filing of a responsive pleading by April 15, 1990. He also denied the petitioner's motion to enter default judgment. A copy of this opinion is attached as Appendix B-1 to the petition for writ of certiorari.

Dissatisfied with disposition by the district court, petitioner filed a notice of appeal to the United States Supreme Court (sic) of the order of Judge Lifland on May 7, 1990. (*See* Appendix of respondent, Berson, at 4ra.) Although originally directed to this Court, this notice was accepted and filed by the United States Court of Appeals for the Third Circuit. Subsequent to the filing of petitioner's notice of appeal, respondent, Berson, filed her notice of motion for summary judgment. On June 28, 1990, after considering opposition filed by the petitioner, Judge Lifland granted Dr. Berson's motion and dismissed petitioner's cause of action in a separate memorandum and order of June 28, 1990. (See appendix of respondent, Berson, at 1ra.)

It is the position of these respondents that the within petition is procedurally improper. While petitioner attacks the substantive dismissal of the complaint against various defendants (petitioner does not challenge the dismissals of the action against Dr. Julian Freeman, Brian Guest, Lu-Ann Watson, and Paul Snyder), no appeal was filed subsequent to the June 28, 1990 order dismissing Dr. Janet Berson from the case. The order from which petitioner gave notice of appeal was the first memorandum and order of Judge Lifland issued April 6, 1990, which notice of appeal was filed May 7, 1990. At that time, Dr. Berson was still in the case and the order was not a final order as to all issues and all defendants. Thus, any appeal would necessarily be interlocutory.

Interlocutory appeals require written certifications of the interlocutory questions by the trial judge. As is evidenced by 28 U.S.C. § 1292(b), discussed in Point I, *infra*, this certification is a prerequisite for appellate jurisdiction. No such certification was ever given in this case.

On November 26, 1990, the United States Court of Appeals for the Third Circuit issued its decision affirming the United States District Court for the District of New Jersey. A petition for

rehearing *en banc* was denied by the United States Court of Appeals for the Third Circuit on January 25, 1991. Whereupon, Raymond Auger, through his present counsel, filed his petition for a writ of certiorari to this judicial body.

For the reasons discussed hereafter, respondents most respectfully submit that the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS PROCEDURALLY DEFICIENT AS TO RESPONDENTS AND SHOULD BE DENIED.

Petitioner invokes the jurisdiction of this Court in reliance upon 28 U.S.C. § 1254(1). This statue provides as follows:

> § 1254. Courts of Appeals; certiorari, certified questions.
>
> Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are

> desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Petitions for writ of certiorari are governed by United States Supreme Court Rule 10, which provides as follows:

> Rule 10. Considerations Governing Review on Writ of Certiorari.
>
> 1. A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

> (c) When a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.
>
> 2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

As will be demonstrated, the within petition fails to pass muster under the above statute and rule and accordingly should be denied.

In order to more fully understand the chronology of events in this case a simple statement of the concluding events is helpful:

A. April 6, 1990,
Honorable John C. Lifland, U.S.C.J. issued first opinion granting summary judgment as to remaining defendants and allowing respondent Berson to file answer by April 15, 1990.

B. April 16, 1990,
Respondent, Berson, complied with order and filed answer.

C. May 7, 1990,
Petitioner filed notice of appeal which was accepted by the United States Court of Appeals for Third Circuit as to April 6, 1990 order of Honorable John C. Lifland.

D. May 22, 1990,
Respondent, Berson, moved for summary judgment as to the plaintiff's complaint against her.

E. June 26, 1990,
Honorable John C. Lifland, U.S.D.J. entered second order granting summary judgment as to respondent, Berson.

As is plainly evident from the above list, petitioner's notice for leave to appeal was filed more than 6 weeks prior to the date when the United States District Court for the District of New Jersey dismissed the final defendant from the action. As petitioner's notice of appeal illustrates, petitioner sought review of the April 6, 1990 district court opinion of the Honorable John C. Lifland, U.S.D.J. while the case had not been resolved as to all issues and all parties. This is clearly an interlocutory situation which requires certification by the trial court. The United States Court of Appeals for the Third Circuit received the case in this posture and, that remains the posture of the case before this Court with the addition that none of the requirements for a grant of a writ have been met.

This Court should not assert jurisdiction to determine this case. Since the April 6th memorandum and order of Judge Lifland did not resolve all issues as to all parties, the appeal must be deemed to be interlocutory. Interlocutory appeals are governed by 28 U.S.C. § 1292 which provides as follows:

> § 1292. Interlocutory decisions
>
> (a) Except as provided in subsection (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting continuing, modifying, refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court; . . .
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten (10) days after the entry of the order: provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Paragraph (b) of the above rule clearly indicates that a trial judge must certify the question before an interlocutory appeal is allowed. Numerous opinions also hold that without such certification there is no appellate jurisdiction. *See e.g., Barfield v. Weinberger*, 485 F.2d 696 (5th Cir. 1973). In the present case, the trial judge did not certify any interlocutory question and no appeal from the final order was taken, therefore no appellate review is available. Petitioner fails to address this issue and instead

turns directly to an examination of the allegations against the respondents. This practice is erroneous under the cited law and mandates a denial of the petition.

In summary, the petition for writ of certiorari should be denied because no appeal has been filed from the final determination of this matter and because the order from which petitioner has appealed is an uncertified interlocutory order for which there exists no appellate jurisdiction.

II.

THE PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED ON SUBSTANTIVE GROUNDS AS WELL.

Even if this Court were to address petitioner's argument on a substantive basis, the petition should be denied. The crux of petitioner's argument is that the district court failed to give proper treatment to the *pro se* complaint. In particular, petitioner suggests that the district court failed to consider the conspiracy argument under 42 U.S.C. § 1985 and 42 U.S.C. § 1986. A review of the opinions below shows that this is patently untrue.

When looking at petitioner's complaint as to the respondent, the Court will find only conclusory statements which at their core represent a claim that mere participation as attorneys, witnesses, and litigants in state court proceedings is sufficient to constitute state action under the Civil Rights Act. These conclusory statements fail to show a cause of action under 42 U.S.C. § 1983, § 1985 or § 1986.

The district court correctly held and the Third Circuit correctly affirmed, the determination of no cause of action as to respondents that their mere participation in state court proceedings does not constitute state action. The opinion of the Honorable John C.

Lifland, U.S.D.J. indulgently characterized petitioner's complaint under 42 U.S.C. § 1983. The District Court's treatment of the complaint was more than just.

Upon evaluating respondent's motion for summary judgment, the court opined that respondents, Antoinette TenEyck, Steven TenEyck, Kenneth S. Domzalski, and Brian Guest were not a "state actors" for the purpose of 42 U.S.C. § 1983. The court correctly cited to the prior decisions in *Hall v. Quillen*, 63 F.2d 1154 (4th Cir. 1980) and *Anderson v. Glismann*, 577 F. Supp. 1506 (D. Col. 1984). Petitioner produced no evidence to substantiate an inference that any court or other state official influenced or "conspired" with any of the respondents.

Notwithstanding the palpable lack of substance in petitioner's complaint, the detail of Judge Lifland's memorandum and order demonstrates the careful consideration and granting of favorable inferences to petitioner that the Court gave before rendering its decision. It is obvious that the district court gave all favorable inferences to the petitioner.

It is respectfully submitted that the decision of the United States District Court for the District of New Jersey dismissing the complaint as to respondents, Mr. & Mrs. TenEyck, Mr. Domzalski, and Mr. Guest was proper and appropriate. Even under the liberal construction of pleadings under Federal Rule of Civil Procedure 8(b), the petitioner's complaint failed to pass muster. Moreover, the United States Court of Appeals for the Third Circuit Court appropriately affirmed the decision. Hence, the petition for writ of certiorari should be denied.

Finally, there are no substantial federal questions raised in this petition, no state action to deny civil rights, and no other facts that would provide a basis for a grant of the writ of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari is procedurally improper and substantively unsupported by the facts. Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 90-1624

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October Term, 1991

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT MEMBERS OF THE JUDICIARY OF THE STATE OF NEW JERSEY

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QUESTION PRESENTED

The District Court dismissed the complaint against the state defendants, all members of the New Jersey judiciary who had ruled on matters within their jurisdiction affecting petitioner Auger, under the doctrine of judicial immunity. The Third Circuit affirmed. Auger apparently accepts the validity of the judicial immunity doctrine in his petition, but challenges that doctrine's applicability where there is an allegation that private parties conspired with members of the state judiciary. Accordingly, since Auger limits his petition insofar as the state defendants are concerned to the applicability of judicial immunity where there is such an alleged conspiracy, the state defendants will only address the following question:

Does the allegation that private parties conspired with members of the state judiciary render the doctrine of judicial immunity inapplicable?

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT MEMBERS OF THE JUDICIARY OF THE STATE OF NEW JERSEY

The respondent members of the judiciary of the State of New Jersey respectfully request that this Court deny the petition for writ of *certiorari* seeking to review the judgment of the United States Court of Appeals for the Third Circuit found at Appendix A of the petition for *certiorari* filed by Raymond Auger in this matter.

ITERSTATEMENT OF THE CASE

COUN

The lower courts dismissed Auger's claims against all of the sta te judicial defendants based on judicial immunity. Au ger seems to accept the validity of this doctrine in his petition, but challenges its applicability in the present ca se because the state judicial defendants were allegedly y involved in a conspiracy with private parties to dep rive Auger of his constitutional rights. However, this court has already ruled that judicial immunity applies in such circumstances. *Dennis v. Sparks*, 449 U.S. 24 (1980). Therefore, *certiorari* is not warranted.

Due to the dismissal of this action prior to the initiation of pre-tri al discovery, the facts are based upon the pleadings. It appears that Auger and his former wife (defendant-Ar toinette Teneyck) had been involved in domestic and custody disputes as early as April 1983. Ultimately, these disputes culminated in a custody trial during the period of December 1985 through April 1986 wherein Antoinette Teneyck sought an order granting her custody of the r two children (PaE-26, ¶12). This proceeding apparently took place before the Honorable Martin Haines, J.S.C. (PaE-26, ¶14).

Various tr al, pre-trial and postjudgment motions, as well as petitio ns and applications were brought by both parties. Appa ently, the rulings on these various applications were ne ative towards Auger. Several of the postjudgment ap lications were resolved by defendants Superior Cou Judges Dominick Ferrelli, Anthony Tunney, Cornelius P. Sullivan and Myron H. Gottlieb. Auger then made s veral appellate applications which were

denied by the six named Appellate Division judges and the Chief Justice of the New Jersey Supreme Court.

Apparently dissatisfied with the results he was receiving in state court, Auger brought an action in federal court on behalf of himself and his two children on July 27, 1989 (PaE1). Generally, Auger alleged that the Teneycks, a court appointed expert, their attorneys, and that State Judiciary were involved in a conspiracy to deprive him of his constitutional rights (PaE1).

Among the complaints against the thirteen members of the judiciary of the State of New Jersey are that they participated in a conspiracy to deprive Auger of his constitutional rights based on decisions or acts that they performed in their judicial capacities. Judge Martin Haines allegedly violated Auger's constitutional rights by entering orders that determined the custody of his children and visitation rights and required Auger to attend family counseling (PaE24-33, ¶¶9-28). Judge Haines also allegedly entered orders requiring Auger to pay attorney's fees, and allegedly denied Auger's motion to restrain Steven Teneyck for interfering in parental matters (PaE41, ¶47). Finally, the complaint also alleged that Judge Haines refused to allow Auger rebuttal time in a motion that was being heard before him (PaE28, ¶17).

As to the claims against the other judges they were quite sparse. Judge Friedman presided over state proceedings where Auger brought an action against the Teneycks, their attorneys and Dr. Berson. It is not clear from the complaint how Judge Friedman allegedly violated Auger's rights. It was also alleged that Judge Ferrelli granted motions in favor of the Teneycks and assessed

attorney's fees against Auger (PaE42-44, ¶¶49-53). Judge Anthony Tunney allegedly refused to review the custody order entered by Judge Haines (PaE46, ¶58). Judge Cornelius Sullivan was charged with granting a restraining order in violation of Auger's constitutional rights (PaE21, ¶4). Judge Gottlieb was alleged to have denied an application for a restraining order made by Auger (PaE54, ¶69). Judges King, Brody, Ashbey, Coleman, D'Annunzio and Muir, all members of the Superior Court of New Jersey, Appellate Division, along with Chief Justice Robert Wilentz of the State Supreme Court, were alleged to have deprived Auger of his constitutional rights by ruling against him in applications he made in the appellate courts in the State of New Jersey during his custody battle and his subsequent civil suit (PaE47-58, ¶¶61-62; 71-72; 77).

As a result of this alleged conduct by the aforementioned state defendants, Auger contended that he had pled a valid cause of action against them based on numerous federal statutes including 42 U.S.C. §§1983, 1985 and 1986. He sought compensatory damages and an order vacating the numerous adverse rulings he had received in the state court proceedings (PaE56-60, ¶¶A-E). Motions were eventually filed pursuant to Fed.R.Civ.Pro. 12(b)(6) on behalf of all the state judiciary defendants, a municipal court judge, several attorneys and an orthodontist who were also named as defendants.

In an order dated April 6, 1990, the Honorable John C. Lifland, U.S.D.J., granted the respective defendants' motions to dismiss. Judge Lifland also, *sua sponte*, dismissed the case as to both Antoinette and Steven Teneyck as well as their attorneys Kenneth Domzalski and Brian

Guest (PaB19-20). Judge Lifland also allowed defendant Dr. Berson the opportunity to file an answer or otherwise plead out of time (PaB20).

With respect to the damage claim against the judicial defendants, Judge Lifland pointed out that all of the acts that the judges allegedly performed in furtherance of the conspiracy were clearly judicial acts performed within their jurisdiction, which entitled the judges to judicial immunity. The court explained that such immunity is absolute (PaB5-9). Judge Lifland also recognized that the equitable remedies that plaintiff was seeking against the judicial officers were to vacate the orders that they had entered in the state court proceedings. Judge Lifland concluded that such a claim had to be dismissed since the federal district courts had no jurisdiction to vacate state court orders (PaB9-10).

With respect to all the other defendants, the court reasoned that the gravamen of plaintiff's cause of action was based on 42 U.S.C. §1983. The court then concluded that the conduct of these individuals was not being performed under color of state law, a necessary requirement of a cause of action under §1983. Accordingly, Judge Lifland dismissed the case as to all the other defendants as well (PaB10-17).*

---

* In his April 6, 1990 order, Judge Lifland provided Dr. Berson with the opportunity to answer or otherwise plead out of time. A motion to dismiss was filed on behalf of Dr. Berson. Judge Lifland then dismissed the case, concluding that Dr. Berson did not act under color of state law, a necessary requirement of a cause of action under 42 U.S.C. §1983 (Ra2-3).

Auger then filed an appeal with the Third Circuit Court of Appeals. The Third Circuit affirmed Judge Lifland's decision without opinion on November 26, 1990 (PaA1). A motion for rehearing filed by Auger was then denied on January 25, 1991, also without opinion. The present petition for writ of *certiorari* followed.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

THERE IS NO REASON TO GRANT CERTIORARI HERE AS TO ANY ISSUE INVOLVING THE MEMBERS OF THE STATE JUDICIARY BECAUSE THEY ARE ABSOLUTELY IMMUNE FROM SUIT FOR THE ACTIONS THEY TOOK CONCERNING AUGER.

This Court will grant a petition for a writ of *certiorari* "only when there are special and important reasons therefore." S.Ct.R. 10. Factors that are considered in determining whether or not such "special and important reasons" exist are: where a court of appeals decision conflicts with the decision of another court of appeals or a state court; or that decision departs from the accepted course of judicial proceedings; or where the court of appeals decided a question of such importance that it should be decided by the Supreme Court and has not previously been decided by the Supreme Court. S.Ct.R. 10.

In the present case, with respect to the state judiciary defendants, it is more than clear that none of these factors exist. The district court simply applied the doctrine of

judicial immunity to the damage claims against the judicial defendants in this case, which was clearly appropriate since all of the alleged conduct by the judicial defendants involved judicial acts within their jurisdiction.

Auger accepts the validity of the judicial immunity doctrine, but challenges its application in the present case because the state judicial defendants were allegedly involved in a conspiracy with private parties. However, judicial immunity has already been held applicable by this Court to situations where a judge has allegedly conspired with private parties to deprive a litigant of his constitutional rights. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). Therefore, *certiorari* should be denied because well-established precedent supports the application of judicial immunity to the state court judges who were defendants below for the judicial actions they took regarding Auger.

Few doctrines are more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967). A judge is absolutely immune from liability for his judicial acts. *Stump v. Sparkman*, 435 U.S. 349, 359 (1978); *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983).

In *Pierson*, this Court held that this absolute immunity applies to suits brought under the Civil Rights Act of 1871, 42 U.S.C. §1983. Later cases have affirmed this principle. *See Stump*, 435 U.S. at 356; *Briscoe*, 460 U.S. at 344 and *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Moreover, this Court has consistently adhered to the rule

that judges defending against §1983 actions enjoy absolute immunity for acts performed in their judicial capacities. *Dennis*, 449 U.S. at 27.

The sole limitation upon judicial immunity is that two criterion must be met. First, the act complained of must be a judicial act. *Stump*, 435 U.S. at 360. Secondly, the judge must have jurisdiction over the subject matter before him at the time he acts. *Id.* at 356; *Dennis*, 449 U.S. at 29.

The acts complained of in the present case were clearly judicial acts, and it is also clear that all the members of the state judiciary were acting within their jurisdiction. Accordingly, the doctrine of judicial immunity is applicable to all the state judiciary defendants in the present case. Indeed, Auger concedes this point in his petition, where he states, "petitioner concedes that a suit would not lie against the judges because of the immunity which applies to their judicial acts." (Pb at 12, n.2).

However, Auger apparently attempts to circumvent the doctrine of judicial immunity by arguing that all of these members of the state judiciary "actively participated in the conspiracy" to deprive Auger of his constitutional rights (Pb at 12, n.2). Presumably, Auger is arguing that based upon this alleged conspiracy, the state court judges should be denied immunity. This argument has no merit and has already been rejected by this Court. *Dennis v. Sparks, supra.*

In *Dennis*, this Court addressed a factual scenario similar to the one in the present case in that a trial court judge was allegedly involved with private parties in a conspiracy to deprive litigants of their rights. In that case,

a Texas state court judge had entered an injunction which enjoined the production of minerals from certain oil fields. The injunction was dissolved by an appellate court. Subsequently, the enjoined parties brought an action in the United States District Court alleging a violation of their constitutional rights pursuant to 42 U.S.C. §1983. Their allegation was that the trial court judge was involved in a conspiracy with the parties bringing the action for an injunction to deprive the enjoined parties of their property rights without due process of law. This Court, in an opinion by Justice White, concluded that the lower courts were correct in granting judicial immunity to the state court judge. *Dennis*, 449 U.S. at 27. Justice White explained:

> Based on the doctrine expressed in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872), this Court has consistently adhered to the rule that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. The courts below concluded that the judicial immunity doctrine required dismissal of the §1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on the immunity grounds. [*Id.* (citations omitted)].

Thus, the fact that the state judicial defendants in this case were alleged to be members of a conspiracy to deprive plaintiff of his constitutional rights does not prohibit the application of the doctrine of judicial immunity.

In short, the lower courts in this case did nothing more than apply the well-settled doctrine of judicial

immunity to the facts of this case and properly dismissed all claims against the state judiciary defendants. The petition for *certiorari* should thus be denied insofar as it seeks review of this clear cut issue. To the extent that Auger's petition raises other issues, *certiorari* is not warranted on any matter relating to the state judicial defendants because their immunity from suit is absolute, consequently rendering review on any other issue as to them unnecessary and superfluous.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied as to the members of the judiciary of the State of New Jersey.

Respectfully submitted,

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(5)

No. 90-1624

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

DANIEL-MARC AUGER, et. al., *Petitioners*

vs.

ANTOINETTE TENEYCK, et. al., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY OF PETITIONERS TO BRIEFS IN OPPOSITION FOR ALL RESPONDENTS

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I. REPLY TO RESPONDENTS, JANET BERSON AND ANTOINETTE TENEYCK, STEVEN TENEYCK, KENNETH S. DOMZALSKI AND BRIAN GUEST

A. REPLY TO THE PROCEDURAL ARGUMENT

Respondents correctly state that Petitioner filed his Notice of Appeal before the district court dismissed one of the parties from the case, Janet Berson. Respondents are correct that as of the date the Notice of Appeal was filed by Petitioner, the district court's judgment was not final as to all parties to the case. They are also correct that in the month following the filing of the Notice of Appeal, June, 1990, the district court rendered a final judgment dismissing Janet Berson from the case.

The weight of authority holds that orders adjudicating only some of the claims may be treated as final orders for the purpose of appellate jurisdiction if

the remaining claims have subsequently been finalized. Practical, not technical considerations, are to govern the application of principles of finality. See Anderson v. Allstate Insurance Company, 630 F.2d 677, 680-681 (9th Cir. 1980) citing the fifth and tenth circuits and citing Gillespie v. United States Steel Corporation, 379 U.S. 148 (1964) and Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1964). See Lovellette v. Southern Railway Company, 898 F.2d 1286, 1289 (7th Cir. 1990) citing 15C Wright & Miller, Federal Practice and Procedure, § 3913 n. 33 (1976 & Supp. 1989)

In this case, the district court rendered final judgment as to all Respondents except Janet Berson on April 6, 1990. On May 7, 1990, Petitioner filed a Notice of Appeal as to all

Respondents, including Janet Berson. The Third Circuit accepted and docketed this appeal. On June 26, 1990, the district court rendered final judgment as to Janet Berson.

Because claims against the last remaining defendant, Berson, were finalized shortly after the filing of the Notice of Appeal, the district court's judgment as to Berson and the other Respondents should be treated as final for the purposes of appellate jurisdiction.

But, assuming arguendo that the Third Circuit lacked jurisdiction to decide the Petitioner's appeal, as Respondents contend, then the Third Circuit's affirmance would be improper under Supreme Court Rule 10.1(a) and this Court should grant certiorari and reverse the Third Circuit on that ground.

Respondents' procedural argument is not material to the standards for granting certiorari. **"A litigant in a federal case is not compelled to wait until the case is over before seeking certiorari, because it is not a requirement of certiorari to review an order of a federal court that the order be a final decision."** Air Line Pilots Association International v. UAL Corporation, 897 F.2d 1394, 1397 (7th Cir. 1990). In other words, nothing in the language of Supreme Court Rule 10 governing review on writ of certiorari mandates that the judgment under review be a final judgment.

Respondents' procedural argument undercuts their position. Either the procedural argument is incorrect and does not advance their argument that certiorari should be denied, or,

alternatively, the argument, taken as true, **supports** the argument that the Third Circuit decision was improper and that this Court should grant certiorari for this reason.

B. REPLY TO SUBSTANTIVE ARGUMENTS

Respondents' substantive arguments against certiorari are also identical. They argue (1) that the Third Circuit correctly affirmed the holding of the district court that they were not state actors under 42 U.S.C. § 1983 and (2) that Petitioner did not produce evidence that they conspired with any state actor.

Respondents failed to address Petitioner's point that this Court has held that a private party conspiring with a state actor becomes imbued with state action as a result of the conspiracy. See Petitioner's Petition at 32-38. The Third Circuit disregarded this Court's

established precedent establishing this point. Petitioner's pro se complaint adequately alleges that these respondents conspired with state court judges. The complaint alleges that:

> The Defendants, and others unknown to the Plaintiffs at this time, at all times pertinent to this complaint have acted in concert under the color of the laws of New Jersey to deny Plaintiffs the equal protection of the law and due process of law, to interrupt, to curtail and terminate the parental rights of Plaintiff Raymond Auger, ...
>
> Petition for Writ of Certiorari at E-15.

The complaint also alleges in sufficient detail the role played by Janet Berson in the conspiracy in six paragraphs of the complaint: see paragraphs 40 to 45 of the complaint, pages E-38 to E-40 of the Petition for Writ of Certiorari. Similarly, the complaint also alleges in sufficient

detail the role played by the other Respondents: see pages 8 through 13 of the Petition for Writ of Certiorari.

Respondent Janet Berson states that Petitioner "produced no evidence to substantiate an inference that any court official influenced Dr. Berson." Berson's Brief in Opposition to Certiorari at 12. A plaintiff carries no burden to **produce evidence** in his complaint. He needs only conform to the notice pleading requirements of Federal Rule of Civil Procedure 8(b). A pro se litigant, of course, is held to less strict standards of pleading. See Petition for Certiorari at 26-27.

Neither the district nor circuit courts permitted Petitioner any opportunity to conduct discovery and gather evidence implicating Respondents. Petitioner was hardly in a position to

produce evidence. His pleadings were more than sufficient.

II. REPLY TO JUDICIAL RESPONDENTS:

THEY ARE INCORRECT AS TO PETITIONER'S CLAIM FOR INJUNCTIVE RELIEF AND ATTORNEY'S FEES AND COSTS BECAUSE THE THIRD CIRCUIT'S DECISION CONFLICTS WITH PULLIAM V. ALLEN[1]

A. WHAT PETITIONER'S COMPLAINT SAYS

Petitioner's pro se complaint pleads a § 1983 action against the judicial respondents for injunctive relief. No judicial immunity applies to his type of action. Pulliam v. Allen 466 U.S. 522 (1984). The Third Circuit disregarded settled Supreme Court precedent in affirming the dismissal of the judicial defendants as to claims for injunctive

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[1]Petitioners concede that no grounds for certiorari lie concerning the claims for damages under § 1983. However, these judges are required to testify even though they are immune. See Dennis v. Sparks 446 U.S. 24 (1980).

relief. Certiorari should be granted on this issue.

The pro se complaint requests:

> Preliminary and permanent injunctions against the Defendants and their agents, successors, employees, and associates, restraining the Defendants from further harassment, intimidation, and persecution of the Plaintiffs for denial of their constitutional rights, privileges and immunities
>
> Petition for Writ of Certiorari at E-58.

The complaint also requests:

> Judgment against the New Jersey Judges named above as municipal judge, Superior Court Judges, Appellate Court Judges, Supreme Court Judge, for injunctive relief and for filing costs
>
> Petition for Writ of Certiorari at E-56.

Petitioner, in addition, requested attorney's fees against the judicial respondents. Id. at E-60.

Furthermore, the complaint specifically describes the judicial conduct which Petitioner seeks to enjoin. For example, Petitioner alleges the following about trial level judges:

a. Judge Haines deprived him of custody and visitation without affording him due process. Petition for Writ of Certiorari at E-4, E-19, E-24, E-25, E-26, E-27, E-28, E-29, E-30, E-31, E-32, E-36, E-37, E-42.

b. Judge Tunney refused to review a custody order giving Petitioner's former wife sole custody, thus depriving him of constitutional rights. Petition at E-5 and E-46.

c. Judge Ferrelli ordered Petitioner to abdicate his parental rights in violation of

the constitution and retaliated by assessing him attorney's fees. Petition at E-6, E-40, E-43, E-44, E-45.

d. Judge Sullivan granted a restraining order against Petitioner ex parte, thus depriving him of procedural due process. Petition at E-21.

Taking these pro se allegations as a true for the purposes of Rule 12(b)(6), and reading them with the leniency required by this Court in Haines v. Kerner 404 U.S. 519 (1972), they clearly plead a proper cause of action for injunctive relief under Pulliam v. Allen, supra. They establish that these judges systematically deprived petitioner of custody and visitation without affording him procedural due process the law

requires when fundamental constitutional rights are involved.

B. THE COMPLAINT PLEADS DEPRIVATIONS OF CONSTITUTIONAL RIGHTS BY JUDGES

The right to parent-child relationship is a fundamental right under the Constitution protected by due process clause of the Fourteenth Amendment and the Equal Protection Clause. See Santosky v. Kramer, 455 U.S. 745, 753 (1982), Stanley v. Illinois, 405 U.S. 645, 651 (1972) and cases cited in the Petition for Writ of Certiorari at 31-32. See Michael H. v. Gerald D. ___ U.S. ___, 109 S.Ct. 2333, 2347 (1989)(plurality holding that father has constitutionally protected interest in his relationship with his child); Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981); Lehr v. Robertson, 463 U.S. 248, 256 (1983).

When a state court deprives a parent of custody and/or visitation, the deprivation is one of constitutional dimension. That constitutes irreparable harm. A federal district court has jurisdiction to enjoin future deprivations by state court judges if these deprivations violated due process.

C. WHAT PULLIAM V. ALLEN HELD

In Pulliam v. Allen, 466 U.S. 522 (1984) this Court held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity and that judges may be liable for attorney's fees and costs under 42 U.S.C. § 1988. Pulliam has twice been cited with approval by this Court since 1984. See Kentucky v. Graham, 473 U.S. 159, 164 (1985) and Forrester v. White, _____

U.S. _____, 108 S.Ct. 538, 545 (1988).

Pulliam v. Allen is the law of this land.

In Pulliam v. Allen, supra., plaintiff sought an injunction against a state court magistrate in federal district court under 42 U.S.C. § 1983. Plaintiff claimed that her practice of imposing bail upon persons arrested for nonjailable offenses and incarcerating people unable to post bail was unconstitutional. This Court affirmed the Court of Appeals which had affirmed the district court's granting of the injunction and assessing attorney's fees and costs against the judge.

This Court said in Pulliam v. Allen:

> We have never had a rule of absolute judicial immunity from prospective relief and there is no evidence that absence of immunity has had a chilling effect on judicial independence.
>
> 466 U.S. at 536.

This Court also stated:

> Congress enacted § 1983 and its predecessor, § 2 of the Civil Rights Act of 1866 to provide an independent avenue for protection of federal constitutional rights. The remedy was considered necessary because **state courts were being used to harass and injure individuals, either because state courts were powerless to stop deprivations, or were in league with those bent on abrogating federally protected rights.**
>
> 466 U.S. at 540.

Petitioner's pro se complaint alleges that state court judges harassed and injured him and other fathers by depriving him and other fathers of the federally protected right of maintaining and nurturing the parent child relationship. Petitioner alleges that judges failed to afford him and other fathers elementary rights of due process and equal protection which resulted in his losing custody and visitation and

losing his parental right to participate in child rearing decisions affecting his own children. Petitioner's claim is almost identical to that of the plaintiff in Pulliam v. Allen.

D. THE THIRD CIRCUIT DISREGARDED PULLIAM V. ALLEN

The Third Circuit affirmed the district court's dismissal of Petitioner's claim for prospective injunctive relief against the judicial respondents. The district court rejected this claim in one short paragraph without analyzing the issue:

> United States District Courts have no jurisdiction "over challenges to State Court decisions in particular cases if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in [the Supreme Court]. 28 U.S.C. § 1257. District of Columbia Court of Appeals v. Feldman 460 U.S. 462, 482 (1983). Mr. Auger's sole recourse is to the United

States Supreme Court to redress any alleged constitutional error in the decisions of the New Jersey courts.

Petition for Writ of Certiorari at B-10.

The district court's holding (and the Third Circuit's affirmance) conflicts with this Court's holding in Pulliam v. Allen, supra. This conflict between the Third Circuit and this Court provides the basis for certiorari review. Pulliam v. Allen permitted federal court jurisdiction over a claim against a state judge who deprived litigants of federal due process rights in a particular case. Pulliam v. Allen did not hold that plaintiff's only recourse was to appeal the federal constitutional issues to the state supreme court and then to this Court.

District of Columbia Court of Appeals v. Feldman 460 U.S. 462 (1983),

relied upon by the district court, is distinguishable. The issue presented was whether the District of Columbia federal district court had jurisdiction to review a decision of the District of Columbia federal circuit court which denied plaintiff's application to be admitted to the District of Columbia bar.

The case turned on whether the circuit court's decision was a judicial act not subject to district court review, or whether its decision was a non-judicial, or ministerial act, which would be subject to district court review. Feldman held that the district court had jurisdiction to review plaintiff's challenge to the constitutionality of a bar admission rule which excluded lawyers who had not graduated from an approved law school, but that the district court lacked jurisdiction to review the circuit

court's application of that rule to the particular plaintiff.

The district court (and Third Circuit) in the case at bar relied on **pure dictum** in Feldman stating that the district court had no authority to review final **state** court judgments pertaining to bar admissions, that review can only be had in this Court. 460 U.S. at 482. This comment, pertaining to state court judgments, had no relevance to the issue presented, e.g., whether a **federal** district court had jurisdiction to review a bar admission decision rendered by a **federal** appeals court.[2]

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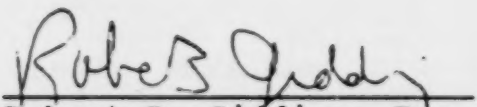
[2] The Feldman case does not support dismissal of the judicial respondents for other reasons. First, it was decided **before** Pulliam v. Allen; it cannot be argued that Feldman restricted or narrowed Pulliam. Second, this Court in Pulliam did not even cite to Feldman. If the Court regarded Feldman as relevant to Pulliam, it surely would have recognized that in its opinion in Pulliam.

Feldman should not be relevant to the case at bar. But if, as the district court stated in its opinion, it does control here, and the district court lacks jurisdiction over Petitioner's claim for injunctive relief under § 1983, then we are faced with two conflicting United States Supreme Court decisions: Feldman and Pulliam. If this is so, this Court should grant review to resolve this conflict.

If Feldman is not relevant, then the Third Circuit's decision affirming the district court directly conflicts with this Court's holding in Pulliam v. Allen. This Court should grant the petition for review on this ground.

Respectfully submitted,



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